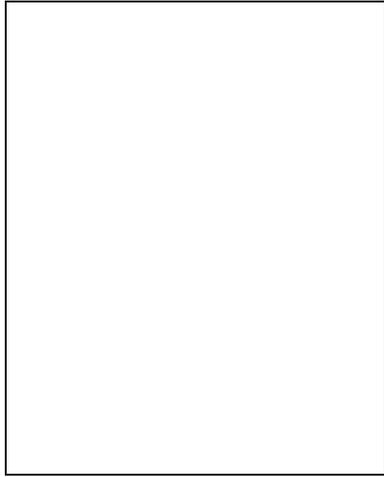


THE RIGHTS OF WAR AND PEACE

BOOK III

NATURAL LAW AND
ENLIGHTENMENT CLASSICS

Knud Haakonssen
General Editor



Hugo Grotius

NATURAL LAW AND
ENLIGHTENMENT CLASSICS

*The Rights of
War and Peace*

BOOK III

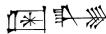
Hugo Grotius

Together with Grotius's Prolegomena to the
First Edition of *De Jure Belli ac Pacis*

Edited and with an Introduction by
Richard Tuck

From the edition by Jean Barbeyrac

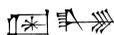
Major Legal and Political Works of Hugo Grotius



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THE RIGHTS OF WAR AND PEACE

BOOK III

*Certain General Rules, shewing what,
by the Law of Nature, is allowable in War;
where also the Author treats of Deceit
and Lying.*

I. We have already seen, not only who may make War, but for what Reasons too they are permitted to engage in it. We are now to enquire¹ what is allowable in War, and how far, and in what Circumstances it is so. And this we must consider, either simply in itself, or with Regard to some antecedent Promise. What is simply in itself allowable in War, shall be considered first from the Law of Nature, and then from that of Nations. To begin with what Nature allows.

I. *The Subject and Design of this Book.*

I. (1) St. AUGUSTIN says, that in the midst of War itself, Faith is to be observed, and Peace endeavoured, *Ut in ipsis bellis, &c.* Ad Bonifac. Comit. *Epist.* LXX. *Esto ergo, etiam bellando, pacificus,* *Epist.* CCV. *Ad eundem Bonifac.* There is in PROCOPUS, *Vandalic.* Lib. I. (Cap. XVI.) a fine Discourse of *Belisarius* to his Soldiers, wherein he shews, that those who make War, ought not to abandon Justice. PAULUS OROSIUS says, that Civil Wars are made in this Manner, when unavoidable, by Christian Princes, in the Times of Christianity. *Ecce, Regibus & temporibus Christianis, &c.* Lib. VII. The same Historian, speaking of *Theodosius*, defies all the World to instance, from the first founding of *Rome*, a single War undertaken so justly and so necessarily, and so successfully terminated, through the divine Providence, that neither the Battles, during it, had been very bloody, nor Victory attended with cruel Revenge. GROTIUS.

II. *In War all Things necessary to the End are lawful.*

^a *Victor. De jure belli, n. 15.*

^b B. ii. ch. 1. § 3. n. 3.

^c *Victor. ubi supra, n. 18, 39, 55.*

^d B. ii. ch. 2. § 10.

II. I. And here we must observe, *First*, That in Things of a moral Nature, as we have often said before, ¹ those ^a Means which conduce to a certain End, do assume the very Nature of that End: And therefore we are supposed to be authorised to employ those <517> Things, which are (in a moral, not a physical Sense) ² necessary to the obtaining our just Rights. By Right I understand what is strictly so called, and imports that ³ Power of acting which is intirely founded on the Good of Society. Wherefore, as we have remarked elsewhere, ^b if I cannot otherwise save my Life, I may, by any Force whatever, repel him who attempts it, tho', perhaps, he who does so is not any ways to blame. Because this Right does not properly arise from the other's Crime, but from that Prerogative with which Nature has invested me, of defending myself.

2. By which also I am impowered to invade and seize upon what belongs to another, without considering whether he be in fault or no, whenever what is his threatens me ^c with any imminent Danger; but I am not to claim a Property in it, for that is not necessary to the End in Question, but only to detain it till my Security be sufficiently provided for; as we have elsewhere ^d declared. So by the Law of Nature I have a Right to take from any one what he has of mine, ⁴ and if this cannot easily be

II. (i) See B. II. *Chap. V. § 24. Num. 2.* and *Chap. VII. § 2. Num. 3.*

2. Our Author does not mean Things essentially bad, and which, as such, cannot be lawful in any Case, or to any End whatsoever; but only those, which a Man could not do otherwise, without the necessary Connection they have with a lawful End. See what he says afterwards, at the End of Paragraph 6. Things bad in their Nature are indeed generally not necessary, with Regard to the Necessity in Question. But, admitting they were, as that is not impossible; and that a Person, for Instance, could not obtain or preserve his just Rights but by Adultery, Blasphemy, Sacrilege, Abjuration of the Religion he believes true; the Innocence of the End would neither hinder the Means from being utterly unlawful, nor discharge him from the Obligation of renouncing the most lawful Pretensions, rather than to employ such Means.

3. *Facultatem agendi in solo Societatis respectu.* See our Author's *Preliminary Discourse*, § 7, 8. Not that the other Kinds of Rights which impose an imperfect Obligation, do not contribute to the Good of Society. But they are not absolutely necessary to maintain it in Peace; and therefore they cannot be pursued by the Methods of Force.

4. See above, B. II. *Chap. VII. § 2.*

effected, I may take what is equivalent to it; and ^e this I may do too for the Recovery of Debt. And in those Cases I become Proprietor of what I have taken, because there is no other Way of redressing the Inequality that was to my Disadvantage.

^e *Sylv. in verb. bellum, part 1. n. 10. ver. prima.*

3. So likewise where the Punishment is just, there all Manner of Violence and Force, and whatever is a Means necessary to execute that Punishment, or is a Part of it, is just too; as Devastations by Fire, or otherwise, provided that they exceed not the Bounds of Equity, but bear a Proportion to the Offence committed.

III. We must remember, *Secondly*, That this our Right is not to be accounted for only by the first Occasion of the War, but also from other subsequent Causes; as in a Suit of Law, where the contending Party does often acquire and find out a new Right, after the Process is commenced, which was not thought of before. Thus they, who join with him that invades me, whether they be Allies or Subjects, do give me a Right of defending myself against them likewise. Thus they who engage with others in an unjust War, especially in a War which they might or ought to have known to be unjust, are thereby obliged to reimburse the Charges, and to repair the Damages of it, because it is through their Fault that they are sustained. Thus too, those who come into the Measures of a War, undertaken without any warrantable Reason, are themselves culpable, and obnoxious to Punishment, in Proportion to the Injustice that accompanies their so doing; according to *Plato's* ¹ Opinion, who justifies the Continuance of a War, *Till the Guilty are compelled to undergo the Punishment which the Party offended shall inflict upon them.*

III. *What is lawful and right does not arise only from the Occasion of the War, but also from incident Causes in the Course of it.*

IV. 1. We must observe, *Thirdly*, ¹ That many Things sometimes fall in indirectly, and beyond our Design, to be lawful to us, to which, in the Nature of the Things, simply considered, we have no Pretence. How

IV. *Some Things may by Consequence be acted without*

III. (1) This Passage has been cited above, *B. II. Chap. XX. § 8. Num. 8.* at the End.

IV. (1) See THOMAS AQUINAS, II. I. *Quaest. LXXIII. Art. 8.* and MOLINA, *Tract. II. Disp. CXXI.* GROTIUS.

*any Injustice,
which would be
no Ways lawful
had they been
purposely and
originally
designed.*

^a B. ii. ch. 1.

^b *Victor. de
jure belli, n. 27.*

this holds good in the Case of Self-Defence, we have elsewhere ^a shewn. Thus, in the getting of our own, ^b if just so much as is precisely our Due, cannot be had, we have a Right to take more, but under the Obligation of restoring the Value of the Overplus. Thus a Ship full of Pirates, or a House of Thieves, may be sunk and fired, tho' within the Ship, or the House, there may be Children, or Women, or other innocent Persons, who from such an Assault must needs be exposed to manifest Dan-<518>ger. ² *Nor is he guilty of Murder, says St. Austin, who has inclosed his Estate with a Wall, if any one by the Fall of it shall be wounded and die.*

2. But, as we have frequently advised before, every Thing that is conformable to Right properly so called, is not always absolutely lawful; for sometimes our Charity to our Neighbour will not suffer us to use this rigorous Right. Wherefore, in such Cases, we ought to take all possible Care to prevent all such Accidents, which may fall out beyond what we aim at; unless the Good we design be far greater than the Evil we fear, or unless, where the Good and the Evil being equal, our Hopes of obtaining the Good be greater than our Fears of the Evil, which Prudence must determine; yet so, that always in a doubtful Case we incline, as the

2. *Unde nec reus est mortis, alienae, qui quum suae possessioni murorum ambitum circumduxit, aliquis ex ipsorum usu percussus interiit.* Epist. ad Publicol. CLIV. Our Author cites this Passage thus in the first Edition, and in those of 1632, and 1642, the last in his Life Time. The later Editions have been changed, I know not by whom, according to the Original, in which there is *murum* instead of *murorum ambitum*, and *si aliquis* ——— *intereat* for *aliquis* ——— *interiit*. Our Author had followed the Reading in the *Canon Law*, Caus. XXIII. Quaest. V. Cap. VIII. But the Corrector of the Edition of *Rome* has since inserted, upon the Authority of a Manuscript in the *Vatican*, *ex lapidibus murum circumduxerit*; which is better. In the Words that follow, some Editions of the Original have *ex ipsius RUINIS*, instead of *ex ipsorum usu*. The latter Reading seems to be the best, provided it be corrected, and CASU be put for USU, as it ought in my Opinion; it being easy for such an Error to have crept in. The Sense plainly requires it; and GRONOVIVS, who is for reading *prolapsus* instead of *percussus*, was not aware that it would then be clearly and directly the Fault of him who should get upon the Wall; whereas the Question relates to certain Cases, wherein Damage seems to arise from what a Person does in Consequence of his Right; as in this Example, wherein St. AUSTIN means, that a Man has not the less Power to build a Wall, for the enclosing his Possessions, because that Wall may happen to fall down and kill somebody. Which Sense is followed in the Translation of this Passage.

safer Side, to that Part which provides rather for another's Advantage than our own. *Let the Tares grow up*, (says our best Teacher, *Matt.* xiii. 29.) *lest whilst you gather up them, ye root up also the Wheat with them.*³ *To destroy whole Multitudes*, says *Seneca*, *without Distinction, looks like the Rage of Fire, or the Fall of Buildings.* History tells us how much Sorrow and Repentance such an immoderate Revenge cost the Emperor *Theodosius*, upon the Reproof of *St. Ambrose*.

3. Nor tho' GOD does so sometimes, ought it to be an Example to us, because of that absolute Right of Dominion which he has over us, which he has not granted us to have over one another, as^c I have observed elsewhere. And yet even GOD himself, who is the just Sovereign of Mankind, does often spare a Multitude of wicked Men, for the Sake of a Few that are good; thereby declaring his Equity, as he is a Judge; as fully appears from *Abraham's* interceding with GOD for *Sodom*. (*Gen.* xviii. 23.) And from these general Rules we may easily perceive, how far our Right extends against our Enemies, by the Law of Nature.

^c B. ii. ch. 21.
§ 14.

V. I. Here also there uses to arise another Question, what we may lawfully do to those, who are not our Enemies, nor are willing to be thought so, and yet supply our Enemies with certain Things. There have been formerly, and still are, great Disputes about this Matter, some contending for the Rigour of the Laws of War, and others for a Freedom of Commerce.

V. *What we may do against them that supply our Enemies with Necessaries, explained by Distinction.*

2. But first we must distinguish between the Things themselves. For there are some Things which are of use only in War, as Arms, &c. Some that are of no Use in War, as those that serve only for Pleasure; and lastly, there are some Things that are useful both in Peace and War, as Money, Provisions,¹ Ships, and naval Stores. Concerning the first, (*viz.* Things useful only in War) it is true what² *Amalasontha* said to the Emperor

3. *Multos autem occidere & indiscretos, &c.* De *Clement. Lib.* I. *Cap.* XXVI. *in fn.*

V. (1) At *Athens* it was prohibited to export Cordage, Casks, Timber, Wax, Pitch &c. See the Commentator upon *ARISTOPHANES's* Comedy of the *Frogs*, (ver. 365.) and that of the *Knights*, (ver. 282.) *GROTIUS*.

2. It is in that Princess's Answer to *Justinian's* Letter, both which *PROCOPIUS* recites, whom our Author quotes in the Margin. *Gotthic. Lib.* I. *Cap.* III.

Justinian, he is to be reputed as siding with the Enemy, who supplies him with Things necessary for War. As to the second Sort of Things, there is no just Cause of Complaint. Thus *Seneca* says,³ I will be grateful to a Tyrant,^a if what I present him with neither encreases, nor confirms his Power of ruining the State, for such Things a Man may give him without contributing to the common Calamity; which he thus explains, *I will not supply him with Money to <519> pay his Guards, but if he wants Marble, or Robes of State, I shall injure nobody, by procuring him such Things, to gratify his Luxury. I will supply him with neither Soldiers, nor Arms; but if he will take it as a Kindness, I will help him to Comedians, and other Things that may contribute to the softening of his fierce Temper. I would not send him Gallies and Men of War, but I would procure him Pleasure Boats, Galliots, and other such Vessels, for Diversion and Recreation.* So also Saint *Ambrose*,⁴ *It is not a commendable Liberality to assist him that conspires against his own Country.*

^a See *Paruta*,
l. 7.

^b See the
Decretals, l. 5.
tit. 6. *De*
Judaeis. Can.
6. and 17.

^c B. ii. ch. 2.
§ 10.

3. As to the third Sort^b of Things that are useful at all Times, we must distinguish the present State of the War. For if I cannot defend myself without intercepting those Things that are sent to my Enemy, Necessity⁵ (as I said^c before) will give me a good Right to them, but upon Condition of Restitution, unless I have just Cause to the contrary. But if the Supply sent hinder the Execution of my Designs, and the Sender might have known as much; as if I have besieged a Town, or blocked up a Port, and thereupon I quickly expect a Surrender, or a

3. *Sed quamvis hac ita sit, &c.* *De Benefic. Lib. VII. Cap. XX.*

4. *Officere enim istud est, &c.* *Offic. Lib. I. Cap. XXX.*

5. Our Author here supposes the Case of being reduced to the last Extremity; and then his Decision is well founded, whatever Mr. COCCEIUS says, *Dissert. De Jure Belli in Amicos*, § 12. wherein he only criticizes our Author, in Regard to what he advances elsewhere, that, in a Case of Necessity, the Effects become common. It is true it suffices, that at such a Time the Goods of another may be used, without even the Proprietor's Consent. But as to the following Cases, that Lawyer has Reason, in my Opinion, to say, § 15, 17. that provided that in furnishing Corn, for Instance, to an Enemy besieged, and pressed by another, it is not done with Design to deliver him from that unhappy Extremity, and the Party is ready to sell the same Goods also to the other Enemy; the State of Neutrality and Liberty of Commerce, leave the Besieger no Room for Complaint. I add, that there is the more Reason for this, if the Seller had been accustomed to traffick in the same Goods with the Besieged before the War.

Peace, that Sender is obliged to make me Satisfaction for the Damage^d that I suffer upon his Account, as much as he that shall take a Prisoner out of Custody, that was committed for a just Debt, or helps him to make his Escape, in order to cheat me; and proportionably to my Loss I may seize on his Goods, and take them as my own, for recovering what he owes me. If he did not actually do me any Damage, but only designed it, then have I a Right, by detaining those Supplies, to oblige him to give me Security for the future, by Pledges, Hostages, or the like. But further, if the Wrongs done to me by the Enemy be openly unjust, and he by those Supplies puts him in a Condition to maintain his unjust War, then shall he not only be obliged to repair my Loss, but also be treated as a Criminal, as one that rescues a notorious Convict out of the Hands of Justice; and in this Case it shall be lawful for me to deal with him agreeably to his Offence, according to those Rules which we have set down for Punishments; and for that Purpose I may deprive him even of his Goods.

4. For these Reasons, those that make War⁶ publish Manifesto's, and send out Declarations to other Nations, as well to signify the Justice of their Cause, as also what probable Hopes they have to obtain their Right.
<520>

6. See Examples of such Declarations, in the League of Christian Princes against the *Aegyptians*, *Saracens*, and others, *Can. ult. de Transact. C. signific. de Judaeis, Extrav. Copios. de Judaeis*, and *Can. I. Lib. V. Extravag. de Judaeis*. A Book is written in *Italian*, entitled, *Liber Consulatus Maris*, in which are related the Constitutions of the Emperors of *Greece* and *Germany*, of the Kings of *France*, *Spain*, *Syria*, *Cyprus*, *Majorca*, and *Minorca*, and also of the *Venetians* and *Genoese* on this Subject. In *Tit. CCLXXIV.* of that Work, such Questions are treated of; and thus it is adjudged, if both the Ship and Freight belong to the Enemy, then, without Dispute, they become lawful Prize to the Captor; but if the Ship belong to those that be at Peace with us, and the Cargo be the Enemies, they may be forced by the Persons at War, to put into any of their Ports, but yet the Master must be satisfied for the Expences of the Voyage. But on the contrary, if the Ship belongs to the Enemy, and the Goods to Neuters, we must then agree for the Ship; but if the Ship-Men will not treat, they shall be forced to carry the Ship into some Port of the Captor's Party, and to pay what they owed for the Use of the Ship. In the Year 1438, there being War between the *Dutch* and the City of *Lubec*, and other Towns lying on the *Baltick* Sea, and the River *Elb*, it was adjudged in a full Assembly in *Holland*, that the Goods found in an Enemy's Ship, which appeared to belong to others, were not to be reputed as good Prize; and

^d *Sylvest. verb. Restitutio.* part 3. § 12.

this was from that Time established there for a Law. So the King of *Denmark* was of the same Opinion, when in the Year 1597 he sent Embassadors to the *Hollanders*, and their Allies, challenging a Liberty for his Subjects to carry their Goods into *Spain*, with which the *Dutch* had the most cruel War. In *France* it has always been permitted for Nations at Peace to carry on Trade, even with the Enemies of the Kingdom; and that with so little Reserve, that the Enemies have often, under other Mens Names, concealed their own Goods, as appears by an Edict in the Year 1543, *Chap. XLII.* which was renewed in that of the Year 1584, &c. In which Edicts it is expressly provided, that their Friends might, in Time of War, exercise a free Trade, so that they did it in their own Ships, and by their own Men, and carry their Ships and Goods wheresoever they pleased; provided that those Goods were not *Belli instrumenta*, warlike Instruments, which might assist the Enemy; in which Case the *French* were then allowed to take them themselves, paying a just Price for them. Here are two Things to be observed, *First*, That warlike Ammunitions were not made Prize, much more were indifferent Merchandizes free from this Danger. I cannot deny but that the Northern Nations have sometimes acted otherwise; but the Practice there has been variable, and accommodated to the Circumstances of Times, rather than regulated by the perpetual Maxims of Equity: For when the *English*, upon Pretence of their Wars, stopt the *Danish* Traffick, there arose a War between those Nations long since, which had this Conclusion, that the *Danes* should lay a Tribute upon the *English*, called the *Danish Penny*, which, tho' the Cause was changed, retained its Name even to the Time of *William the Conqueror*, who founded the present Royal Family in *England*, as *THUANUS*, an Author of great Credit, relates in his History, on the Year 1589. Again, in the Year 1575, Sir *William Winter*, and Mr. *Robert Beal*, Secretary to the Privy Council, were sent by Queen *Elizabeth*, a very wise Princess, to remonstrate, that the *English* could not bear that the *Dutch* should, in the very Heat of the War between *Spain* and the United Provinces, detain the *English* Ships trading to the *Spanish* Ports; as *RHEDANUS*, in his *Dutch* History, on the Year 1575, and Mr. *CAMDEN*, an *Englishman*, on the Year following. But when the *English*, being themselves at War with *Spain*, disturbed the Cities of *Germany* in their Trade with *Spain*, with what a disputable Right they did it, appears from the Writings published on both Sides, worth the Reading, in Order to understand this Controversy. And it is observable, that the *English* themselves acknowledged this in their own Writings; where they chiefly alledge two Things for their Cause, *viz.* that they were Instruments of War that were transported by the *Germans* into *Spain*; and that their antient Treaties had made it unlawful to be done: As afterwards the *Dutch*, and their Confederates, agreed with the *Lubeckers*, and their Allies, in the Year 1613, that neither Party should permit the Subjects of their Enemies to traffick within their Territories, or assist the Enemy with Money, Men, Ships, or Provisions. And after that, in the Year 1627, it was agreed between the Kings of *Sweden* and *Denmark*, that the *Dane* should prevent all trading with the *Dantzickers*, then at War with the *Swede*, and that he should not permit any Merchandizes to pass through *Mare Cimbricum*, the *Sound*, (or the *Baltick*) to any of the *Swede's* Enemies, for which the King of *Denmark*, on the other Side, had Advantages allowed him; but these are particular Agreements, from whence

nothing can be inferred that may be obligatory to all; for the *Germans* also alledged in their Writings, that all Merchandizes were not prohibited by Agreements, but those which had been once imported into *England*, or were procured in *England*. Neither did only the *Germans* blame the *English*, for denying them to trade with their Enemies, but the *Poles* also complained by their Ambassador, that the Law of Nations was violated, because, on *England's* War with *Spain*, they were denied the Liberty of trading with the *Spaniard*, as the aforesaid CAMBDEN and RHEDANUS relate, on the Year 1597. But the *French*, after the Peace of *Vervins*, *Elizabeth*, Queen of *England*, still continuing the War, being importuned by the *English*, that it might be lawful to search the *French* Ships trading to *Spain*, lest any warlike Stores might be concealed, would by no Means grant it, alledging, that it was only a Pretence for Rapine, and to disturb Trade. And in that Treaty which the *English* made with the *Dutch*, and their Allies, in the Year 1525 [*sic*: 1625]], it was agreed, that other Nations, whom it concerned to lessen the Power of the *Spaniard*, should be asked to forbid all Commerce with *Spain*; and if they did not do it freely, then that the Ships should be searched, whether they had in them any warlike Stores; but further than this, that neither the Ships nor Goods should be detained, or any Hurt done upon that Pretence, to those in Peace. And it happened in the same Year, that some *Hamburgers* were going with a Ship into *Spain*, laden, for the most Part, with warlike Provisions, all which was challenged by the *English* (as Prize) but they paid the just Value for the other Goods. But the *French*, when their Ships going into *Spain* were confiscated by the *English*, declared that they would not endure it. We had Reason therefore to say, that publick Declarations are requisite, which also the *English* themselves were sensible of; by whom there is an Instance of such a Declaration made, in CAMBDEN, about the Year 1591, and 1598. Neither are such Notifications always regarded, but Times, Places, and Causes are distinguished: For, in the Year 1458, the City of *Lubeck* did not think itself obliged to take Notice of the Declaration the *Dantzickers* made to them, not to traffick with the *Malgenses* and *Memelenses*, then at Enmity with *Dantzick*. Neither did the *Dutch* observe it in the Year 1551, when the *Lubeckers* declared to them, that they should not trade with *Denmark*, with which they were then at War. But in the Year 1522, when there was War between the *Swedes* and *Danes*, when the *Danes* desired of the *Hanse Towns* to have no Commerce with *Sweden*, some Cities indeed that stood in need of his Friendship complied with him, but the others did not. The *Dutch*, when the War was hot between the *Suede* and the *Pole*, never suffered trafficking with either Nation to be interrupted, but always restored to the *French* what Ships the *Holland* Vessels had intercepted, either returning from *Spain* or going to *Spain*, with which they were then at War. See the Discourse of LUDOVICUS SERVINUS, formerly the King's Advocate, which he made in the Year 1592, in the Affair of the *Hamburgers*. But the same *Dutch* would not suffer the *English* to carry any Goods into *Dunkirk*, where they had then a Fleet: As the *Dantzickers* declared to the *Dutch*, in the Year 1455, that they should carry nothing into the City of *Koningsberg*, according to GASPAR SOUTZIUS, in his *Prussian History*. See CABET. *Decis.* XLIII. Num. 2. and SERAPHIN. *De Freitas*, in *Lib. de justo Imper. Lusitan. Asiat.* where he quotes several other Authors. GROTIUS.

5. Now the Reason why we refer this Case to the Law of Nature, is ⁷ because we find nothing in Histories decreed by the voluntary Law of Nations concerning it. <521> The *Carthaginians* sometimes took the ^e *Romans* Prisoners, who carried Provisions to their Enemies, ^e but upon demand set them at Liberty. When *Demetrius* had entered *Attica* with an Army, and had taken the adjoining Towns of *Eleusis*, and *Rhamnus*, ^f designing to starve *Athens*, he took a Ship, attempting to relieve it, with Provisions, ⁸ and hanged up the Master and Pilot of it, and by that Means deterring others from doing the like, he quickly took the City.

^e *Polyb.* l. 1.
c. 73.

^f *Plut.* *Demetr.*

VI. *Whether
Fraud be law-
ful in War.*

VI. 1. As to the manner of acting against an Enemy; Force and Terror are the proper Characteristick of War, and the Method most commonly used: The Query is, whether Deceit be lawful; for *Homer* said an Enemy might be annoyed,

¹ Ἦ δόλω ἢ βίῃ, ἢ ἀμφαδὸν, ἢ κρυφήδον,
By Fraud, or Force, openly or secretly.

7. The most learned JOHANNES MEURSIUS has many Things of this Subject, in his *Danish* History, B. I. and XI. where you will find the *Lubeckers* and the Emperor for Commerce, and the *Danes* against it. See also CRANTZIUS, *Vandal.* B. XIV. THUANUS, on the aforesaid Year 1589, B. of *Hist.* XCVI. CAMBDEN, besides the above-mentioned Places on the Years 1589 and 1595 where that Dispute between the *English* and the *Hanse* Towns is treated of. GROTIUS.

8. Not much unlike to this is what PLUTARCH relates of *Pompey*, in his History of the *Mithridatick* War, *He set Guards at the Bosphorus, to observe if any sailed into the Bosphorus, and whosoever were caught were put to Death.* Vit. Pomp. (p. 639.) GROTIUS.

VI. (i) Ἦ δόλω, &c. So our Author quotes that Verse from HOMER. But all he says is:

Ἀντάρ ἐπεὶ μνηστῆρας ἐνὶ μεγάροισι τεοῖσι
Κτείνης, ἢ δόλω ἢ ἀμφαδὸν ὀξείῃ χαλκῶ, &c.

Odys. Lib. XI. Ver. 118, 119. It is the Shade of *Tiresias* who tells *Ulysses*, that when he returns Home he will kill his Wife's Suitors, either by Fraud or open Force. See also B. I. Ver. 295, 296. where *Minerva* says the same Thing to *Telemachus*. Our Author has taken the Verse he recites from the Collections of STOBÆUS, who ascribes it to *Antigonus*, as made by him in Imitation of the antient Poet: Ἀντίγονος ἐρωτηθεὶς, πῶς ἂν τις ἐπιθῆτο τοῖς πολεμίοις, εἶπεν Ἦ δόλω, &c. *Florileg.* Tit. LIV. (or LII.). *De Imperatoribus, &c.* p. 365. Edit. Gesner 1549.

And *Pindar*,²

Χρῆ δὲ πᾶν ἔρ ———
 δοντ' ἀμαυρώσαι τῆν ἐχθρόν.
*Whether by Craft or Force we overthrow,
 All Means allow'd to crush the daring Foe.*

And *Virgil's*³ Direction,

Let Fraud supply the want of Force in War. Dryd.

Is strictly followed even by *Riphaeus*,

Just of his Word, observant of the Right. Dryd.

And *Solon*,⁴ so famous for Wisdom, also observes this Maxim; so did *Fabius Maximus*,⁵ commended for it by *Silius*:

Who to Force join'd Artifice.

2. *Isthm.* Od. IV. 81, 82.

3. Upon Occasion of some *Trojans* who had put on the Arms of the *Greeks* their Enemies:

*Mutemus clypeos, Danaumque insignia nobis
 Aptemus. Dolus, an virtus, quis in hoste requirat?*

Aeneid. Lib. II. Ver. 389, 390. And one of those who uses this Strategem, is ranked amongst the justest and most virtuous of the *Trojans*:

*Hoc Riphaeus, hoc ipse Dymas, omnisque juventus
 Laeta facit ———
 ——— Cadit & Riphaeus justissimus unus,
 Qui fuit in Teucris, & servantissimus aequi.*

(Ver. 394, 426, 427.)

4. Our Author no doubt speaks of the Stratagem used by *Solon* for taking the Island of *Salamis*. See his Life in PLUTARCH, p. 82. Vol. I. Edit. Wech.

5. ——— *Tacitusque quiete
 Exin virtuti placuit dolus ———
 De bello Punic. II. Lib. XV. Ver. 326, 327.*

2. In *Homer, Ulysses*, a very wise Prince, was famous for Stratagems of War; whence ⁶ *Lucian* makes this Inference, that Deceit in War is commendable. There is nothing more profitable in War, than Fraud, said ⁷ *Xenophon*; and *Brasidas* <522> in ⁸ *Thucydides* gives the greatest Honour in War to cunning Stratagems. And in ⁹ *Plutarch, Agesilaus* said, It is both just and lawful to deceive an Enemy. And *Polybius*, ¹⁰ Military Exploits performed by open Force are less considerable than what is done by Stratagem and making good Use of Opportunity. And from him *Silius* brings in *Corvinus* speaking thus, ¹¹

6. He not only speaks of War, but of all Cases, in which Fraud is the means, or *Remedy*, for extricating People out of Danger, as the Falshoods made use of by *Ulysses* for his own Preservation, and to obtain the return of his Companions. In *Philopseud. circa init.* p. 326, 327. Edit. Amstel. Vol. II.

7. *De Magister. Equit. Cap. V. Num. 9.* Edit. Oxon. See also his *De Cyr. Institut.* Lib. I. Cap. VI.

8. *Lib. V. Cap. IX.* Edit Oxon. What THUCYDIDES expresses here by the Word κλέμματα, VIRGIL calls also *Belli furta*, Aen. *Lib. XI.* (*Ver. 515.*) upon which the Grammarian SERVIUS cites a like Passage in SALLUST: *Gentis ad furta belli peridoneae.* GROTIUS.

The last Passage is a Fragment which I find in NONIUS MARCELLUS at the Word *Furtum*, p. 310. Edit. Paris. Mercer. See Mr. WASSE's Note upon that Fragment, *Addend.* p. 291. col. 2. It is in *Lib. I. Cap. XX.* of the Collection.

9. *Apophthegm. Laconic.* p. 209. B. Vol. II. *Edit. Wech.*

10. *Lib. IX. Cap. XI.* p. 766, 767. ISAAC CASAUBON translates the Word ἐλάττω in this Passage, in a Manner which would render the Application of it not very just, *pauciora esse, &c.* But that learned Interpreter does not seem to have given sufficient Attention to the Connection of the Discourse, and was led into the Mistake by the Word πλείω in the following Period, which in Reality implies the Number, and not the Quality of the Actions in Question; from whence he probably believed that the Word ἐλάττω should be taken in the same Sense in the preceding Period: Whereas the Historian's Thought is, that the Conduct of a Stratagem in War is not only of greater Consequence, but more difficult; Experience proving, that People more often miscarry than succeed in it: "Ὅτι γε μὴν αὐτῶν, &c. By all which he intends to prove, that the Use of Stratagems is very laudable. So that our Author was in the right to translate, *quae vi fiunt in bello minoris censenda, &c.* And I find, that JUSTUS LIPSIUS understood this Passage in the same Sense, which he quotes in his *Politic*, Lib. V. Cap. XVII. where he expresses it thus: *Facinorum militarium ea esse minoris laudis ac momenti, &c.*

11. Thus our Author cites this Verse with Reason, which agrees with the best Manuscript unless it be better to read *dextrae* than *dextra*, as the last Editor Mr. DRAKENBORG, Professor at *Utrecht*, has done in his Text. The vulgar Editions have

Bellandum est astu; levior laus in duce dextra.

Ambush in War is still by Fortune crown'd,

The Captain's most for Policy renown'd.

So also thought the rigid *Spartans*, as ¹² *Plutarch* observes, therefore they offered greater Victims for a Victory obtained by Policy, than by plain Force. ¹³ The same Author highly commends ¹⁴ *Lysander*, ἀπάταις τὰ πολλὰ διαποικίλλοντα τοῦ πολέμου, *versed in all the Arts and Skill of War*. He also praises *Philopoemen*, ¹⁵ that being instructed in the *Cretan Discipline*, he united the plain and open Way of fighting with Slights

indice dextrae; of which *CELLARIUS* has made, *indice dextrâ*, and explains it in this Manner: *Si actiones bellicae, prius quam fiant, quasi indice digito hostibus praemonstrentur*. But this Explication is contrary to the Design of the General, who speaks. He intends to shew, as appears by what goes before, that the Resolution he takes to make use of Stratagem, is not only necessary with regard to the Conjuncture, but that it will not be less glorious for him to succeed that Way than by mere Force. Whereas according to *CELLARIUS*, he would say on the contrary, that Exploits are more glorious, when performed by open Force. Besides, this Interpretation is somewhat forced, and is not supposed by any Example of an Expression, that seems extraordinary enough. What our Author observes with great Probability, that this is an Imitation of a Passage in *POLYBIUS*, which we have seen in *Note 10*. serves also to confirm the Manner, in which he gives the Verse. He cites here also in a Note a like Thought from the *ALCORAN*, in which *Mahomet* says, *that War makes Deceit necessary*. He remarks further that *VIRGIL* puts not only Anger, but Ambuscades in the Retinue of the God *Mars*:

———— *Circumque atrae Formidinis ora*
Iraeque insidia que Dei comitatus aguntur.

Aeneid. XII. 335, 336. Upon which *SERVIVS* the Grammarian says, that the Poet intends to signify, that Stratagem is necessary in War, as well as Valour: *Non tantum virtute, sed insidiis comitatum se ostendit.*

12. *Vit. Marcell.* p. 311. A. B. Vol. I. *Edit. Wech.*

13. *Vit. Lysandr.* p. 437. The Historian does not speak there of his own Head, and those whose Opinion he gives blamed on the contrary that Conduct, as appears by what follows and goes before.

14. *PLUTARCH* compares him to *Sylla*, in whose Mind *Carbo* said, *there was the Lion and the Fox.* *Vit. Syll.* p. 469. *F.*

15. *Vit. Philopoem.* p. 363. *E.*

and Stratagems. And ¹⁶ *Ammianus* was of Opinion, that *Without any Distinction of Valour, or Cunning, all prosperous Successes in War deserve Commendation.*

3. The *Roman Lawyers* ¹⁷ accounted all Fraud used against an Enemy, innocent; and that it mattered not, ¹⁸ whether a Man baffled his Enemy by Force or Fraud. *Eustathius* on the 15th of the *Iliad* observes that *Deceit is not to be blamed, as be-^{<523>}longing to a Soldier.* And among the Divines, ¹⁹ *St. Augustine*, *If the War be just, it concerns not Justice, whether it be managed by Force or Craft.* And *St.* ²⁰ *Chrysostom* says that those Generals, that overcame by Subtilty, are most commended.

4. But there are Opinions which seem to maintain the contrary, of which I shall mention some hereafter. To decide this Question, it must be considered, whether Deceit be one of those Things that are always Evil, and in which the Maxim takes Place, that we must not do Evil, that Good may come of it; or whether Deceit be to be reckoned among such as are not Evil in their own Nature, but that it may sometimes happen, that they may be good.

VII. *Fraud in its negative Act is not of its self unlawful.*

VII. We must then observe, that some Fraud consists in a negative Act, ¹ and some in a Positive; and here I enlarge the Word even to include those Things which consist in a negative Act, according to *Labeo*, ² who

16. It is in *Sapores's* Letter to the Emperor *Constantius*, where that Prince says, this Maxim of the *Romans* had never been received by his People: *Illud apud nos nunquam, &c.* Lib. XVII. Cap. V. p. 179. *Edit. Vales. Gron.*

17. *Non fuit autem contentus, &c.* Digest, Lib. IV. Tit. III. De dolo malo, Leg. I. § 3. See Mr. *NOODT's* Treatise, *De forma emendandi doli mali*, Cap. I.

18. *Digest*, Nihil interest, &c. Lib. LXIX. Tit. XV. De Captiv. & Postlim. &c. Leg. XXVI.

19. *Quum autem justum bellum suscipitur, &c.* Quaest. X. super *Joshua*. Our Author has changed some Terms in this Place, from having followed the Summary of a Canon, in which this Passage is recited. *Caus. XXIII. Quaest. II. Can. II.*

20. The Passage will be cited below, § 17. *Note 2.*

VII. (i) That is to say, when by not saying or doing a Thing, we designedly give room to others to believe, what we know is false. From whence may easily be discerned wherein deceiving by a *positive Act* consists.

2. *LABEO autem posse & sine dissimulatione, &c.* Digest, Lib. IV. Tit. III. De Dolo malo, Leg. I. § 2.

referred it to that Fraud which is not Evil, when a Man by Dissimulation preserves either his own, or another's. ³ *Cicero* overstretched the Point, when he said, *Disguise and Dissimulation should be banished out of human Life*. For since we are not obliged to discover to others all we know, or desire; it follows, that it is lawful to dissemble some Things before some Men, that is, to hide and conceal them. *We may sometimes wisely conceal the Truth* (said ⁴ *St. Austin*) *under some Disguise*. And that this ⁵ is some-

3. *Quod si Aquiliana definitio vera est, &c.* De Offic. Lib. III. Cap. XV. I have already observed upon *Law of Nature and Nations*, B. IV. Chap. I. § 9. Note 5. that *CICERO* speaks only of a Feint and Dissimulation attended with Injustice and Breach of Faith. Our Author himself cites that great Orator below, § 9. amongst those who believed some Lies innocent.

4. *Licet veritatem occultare, &c.* Lib. contra Mendacium, Cap. X. The same Father says in another Place, that there is a Difference between lying and concealing the Truth. *Quoniam aliud est, &c.* In Psalm v. vers. *Perdes omnes*. The Passage is cited in the CANON LAW, *Caus. XXII. Quaest. II. Cap. XIV.* See *THOMAS AQUINAS* II. 2 *Quaest. LXXI. Art. III. in Resp. ad tertium*: As also *SYLVEST. in verb. Bellum, Part I. Num. 9. GROTIUS*.

The first Passage of *St. AUSTIN*, cited here by our Author, is not *totidem verbis* in the two Treatises of that Father *contra Mendacium*: But I find the Sense of it in the Chapter of the second Treatise, to which he refers, where the Example of our Saviour *JESUS CHRIST* is alledged; who did not lie in telling his Disciples that he had many Things to say to them, but that they could not yet bear them: *non autem hoc est occultare veritatem, &c.* Lib. contra Mendac. Cap. X.

5. Our Author refers us here in the Margin to *Orat. pro Milon.* and that *pro Plancio, &c.* Lib. VII. Epist. IX. The last Citation is false as well as many others, which I correct without taking Notice, for the Passage is in *Letter VIII. of B. X.* and moreover the Letter is not *CICERO*'s but *PLANCIUS*'s who in giving an account of the Conduct he had observed during the Troubles of the Republick, says, that he had been obliged against his Will to feign and dissemble many Things to attain his Ends: *Ita nunquam diffitebor, multa me, ut ad effectum horum consiliorum, &c.* The Passage of the Oration for *Milo*, relates to a different Thing. The Orator endeavours to excuse *Pompey*, for having given Credit, upon too slight Grounds, to the false Reports, which had been spread concerning *Milo*: He says for that Purpose, that those who have the Government of the State in their Hands are obliged to hear too many Things, and that they cannot avoid doing so: *Laudabam equidem incredibilem, &c.* Cap. XXIV. I am deceived if this Mistake of our Author did not arise from his having the *Politicks* of *JUSTUS LIPSIUS* before him, when he quoted this Passage; which Author, in this, as he does in many other Places, applies the last Words to a Subject different from that upon which they were writ. For he also quotes the two other Passages; of which the last, that remains to be examined, is more to the Purpose. *CICERO* says, that the People are pleased to give their Suffrages in such a manner, as will leave them at Liberty to

^a See St. *Chry-*
sostom, De
Sacerdot. l. 1.

times ^a necessary and unavoidable especially in Governors, *Cicero* confesses in many Places. We have a remarkable Instance of this in the Prophet *Jeremy*, Chap. xxxviii. 27. where the Prophet being asked of the King concerning the Event of the Siege, by the King's Advice, wisely concealed it from the Princes, alledging another Cause of their talking together, which yet was not false. So *Abraham* told *Abimelech* true, when he said *Sarah* was his Sister, according to the Custom of speaking in those Days, being his near Kinswoman, wisely concealing that ⁶ she was his Wife. <524>

Gen. xx. 2.

carry fair with every Body, and to conceal their Inclination to favour some Competitors more than others: *Etenim si populo grata est tabella, &c.* Orat. pro Plancio, *Cap.* VI.

6. St. AUSTIN says, that the Patriarch did not lie, and that he only concealed the Truth: *Sed veritatem voluit celari, non mendacium dici.* In *GENES. Quaest.* XXVI. This Passage is quoted in the *Canon Law*, Caus. XXII. Quaest. II. Can. XXII. GROTIUS.

See PUFENDORF, *Law of Nature and Nations*, B. IV. Chap. I. § II. That Chapter with the Notes should be always compared with this Place, as it treats the same Subject with more Extent and Exactness. As to the Words of St. AUSTIN, which our Author cites, they are indeed so conceived in the Canon referred to; but they are not to be found in *Question* XXVI. upon *Genesis*. Which proceeds, as is remarked upon that Canon, from its being composed of different Passages of St. AUSTIN, which GRATIAN has joined together. That Father expresses himself in this manner upon the same Subject in his second Treatise *cont. Mendac. Aliquid ergo veri tacuit, non falsi aliquid dixit, quando tacuit uxorem, dixit sororem.* Ad CONSTANTIUM, *Cap.* X. CLEMENS ALEXANDRINUS observes, that *Abraham* intimates that it was not lawful in those Times to marry a Sister by the same Mother; by which he evidently supposes, that *Sarah* was actually the Sister of that Patriarch by the Father, and not merely a Relation in some more remote Degree. *Strom.* Lib. II. *Cap.* XXIII. p. 502. *Edit. Oxon.* I find the Passage has been already cited by Mr. LE CLERC, upon the twentieth Chapter of *Genesis*, where the Story is related. The late Mr. BAYLE relates it also in the Article *Sarah* of his *Historical and Critical Dictionary*, (p. 2536. col. 2. of the third Edition) but he explains the Word *δμομητρίας*, as only signifying an Uterine Sister. And indeed that is the proper Sense of the Term. But I do not know whether CLEMENS ALEXANDRINUS has not improperly taken it for a Sister both by Father and Mother. Thus he understands by the Word *Polygamy*, the Condition both of those who have Wives at the same Time, and of those who have several one after another, as appears from the Passage recited below, *Chap.* IV. of this *B.* III. § 2. *Note* 3.

VIII. I. But Fraud, which consists in a positive Act, if in Actions is called a Feint; if in Words, a Lye. Some make this Difference between these two, that Words naturally signify the Intent of our Minds, but Actions do not. But on the contrary it is true, that Words of their own Nature, and independently of the Will of Men, signify nothing, unless it be such a confused and inarticulate Noise as is caused by Pain, which comes rather under the Denomination of an Action than a Speech. But if it be objected, that it is peculiar to the Nature of Man, above all other Creatures, that he can discover the Conceptions of his Mind to others, to which End Words were invented; which is certainly true; yet this also should be added, that such a Discovery is not made by Words only, ¹ but by Gestures, &c. as among Persons that are dumb. Whether those Gestures have naturally something common with the Thing signified, or have only a Signification by human Institution. Like to which are those Characters which (as *Paulus* ² the Lawyer says) signify not Words formed by the Tongue, but the Things themselves, either from some Likeness, as the *Egyptian* Hieroglyphicks, or from mere Fancy, as among the *Chinese*.

VIII. *Fraud in its positive Act distinguished either into such outward Acts as admit of several Constructions, or such as always signify the same by Agreement. Fraud in the former Sense lawful.*

VIII. (1) There was a People of *Ethiopia* according to *PLINY*, who had not the Use of Speech, and conveyed their Meaning to each other by nodding their Heads, and by various Motions of the other Parts of the Body: *Quibusdam pro sermone nutus motusque membrorum est.* Hist. Natural. Lib. VI. Cap. XX. The Roman Lawyers have decided, that if those who cannot speak express their Thoughts by the Efforts, which they make to be understood in some other Manner, and by an inarticulate Voice, such Endeavours ought to be deemed a sufficient Declaration of their Will, which otherwise ought to be declared in Words: *Nam etsi prior atque potentior est, quam vox, mens dicentis, &c.* Digest, Lib. XXXIII. Tit. X. *De Supellectile legata*, Leg. VII. § 2. *in fin.* In the *Decretals*, it is said that a deaf, and a dumb Person may enter into a Contract of Marriage, by making known their Consent by Signs: *Nam Surdi & Muti possunt, &c.* Lib. IV. Tit. I. *De Sponsalib. & Matrim.* Cap. XXV. *GROTIUS*.

2. It is in a Law, where he says; It is not by the Figure of the Letters used in writing, but by the Words they represent, that an Obligation is contracted; insomuch as it has been thought fit, that the Writing should have the same Force, as what is signified by Word of Mouth: *Non figura literarum, sed oratione, quam exprimunt literae obligamur, &c.* Digest, Lib. XLIV. Tit. VII. *De obligat. & action.* Leg. XXXVIII. The Lawyer expresses himself in a very philosophical Manner in saying *placuit, it has been thought fit*, &c. for he thereby insinuates that the Use of Signs is the Effect of a Convention, ἐκ συνθήκης. *GROTIUS*.

2. There is therefore another Distinction to be observed in this Place, which we made Use of to take away all Doubtfulness and Obscurity, concerning the Term of *the Law of Nations*. For we then said, that *the Law of Nations* signified, either what was allowed of by every Nation without mutual Obligation, or that which implied a mutual Obligation. ³ In like manner, Words, Gestures and Characters (as < 525 > we have said) were invented to signify by mutual Obligation, which ⁴ *Aristotle* calls *κατὰ συνθήκην*, *according to common Agreement*, but other Things are not so. Hence it follows that it is lawful for me to use other Things as I please, tho' ^a I foresee that another may place a wrong Construction upon it; I speak of the Use of those Things in itself, and not of the accidental Consequences that it may have. Therefore we must here suppose Cases, ⁵ where no Harm can ensue, or where the Harm itself, setting aside the Consideration of the Deceit, is lawful.

^a *St. Aug. De
Doct. Christ.*
l. 2. c. 24.

3. This Distinction is scarce better founded than that of *the Law of Nations*, with which our Author compares it, and in which we have elsewhere shewn the want of Solidity. All the Obligation that is here consists in this; that when a Person is bound to declare his Thoughts, as that cannot be done but by Signs capable of making them known to those he is concerned with, it is commonly necessary for him to employ such as are most used, because there are none more known by all the World, nor consequently more suitable to that Purpose. See what I have said in the Chapter of PUFENDORF, which answers to this, § 5. So that the Difference between Words, Characters, Gestures and other Signs, consists in this, that the Use of the latter being less common; or rather, Use not having given them a determinate Signification, they are not of themselves proper to convey clearly the Sense of the Person that employs them: So that whilst they have no fixed and determinate Meaning either one way or other, they cannot be considered as Signs, upon which there is room to rely. And if it be incumbent on Persons not to use them, when they foresee that others will explain them in a certain Sense, contrary to their Intent, it is not upon account of the Error considered in itself, but of the accidental Consequence, of which our Author speaks, and which we are otherwise obliged to prevent by Virtue of a Law of Nature, whereby we are to avoid all Things that may occasion Evil, directly or indirectly, to those who have not deserved it. Now this would also take Place, admitting that the same Effect should result from the Use of Speech; if, for Instance, we had Reason to believe, that a Person, either thro' Ignorance, Distraction, or otherwise, should take in a wrong Sense what we say to him in the most common and clear Terms.

4. *De Interpret.* Cap. IV.

5. As *Michal* did to save *David* her Husband. 2 *Samuel* xix. 16. GROTIUS.

Of the first we have an Example in our Saviour, who to the two Disciples at *Emaus*, (*Luke* xxiv. 28.) *προσεποιεῖτο*, *made as tho'* he would have gone farther, unless we had rather believe he really intended so, if they had not importuned him to stay: As GOD himself is said to will many Things conditionally, which yet come not to pass, the Condition being not performed. And in another Place, (*Mark* vi. 48.) CHRIST himself *made as tho'* he would have passed by his Apostles sailing on the Sea, that is, unless they entreated him to come up into the Ship. Another Example may be given in St. *Paul*, (*Acts* xvi. 3.) who circumcised *Timothy*,⁶ tho' he well knew what Sense the *Jews* would put upon it, *viz.* that the Law of Circumcision (tho' it was now really abolished) did still oblige the Children of *Israel*, in the Opinion of St. *Paul* and *Timothy*; whereas St. *Paul* had something else in View, that he and *Timothy* might obtain a greater Opportunity of a familiar Conversation with the *Jews*. For neither did Circumcision, the ceremonial Law being abolished, by its Institution any longer signify such a Necessity, neither was the Evil, which followed upon the Error, in which the *Jews* would continue for a while, (tho' afterwards to be laid aside) so great, as that Good which St. *Paul* designed, which was a more easy Propagation of the Doctrine of the Gospel. The *Greek* Fathers often call this dissembling *οἰκονομία*,⁷ *good Management*, of which we have an excellent Sentence of *Clemens Alexandrinus*, who discoursing of a good Man, says, *ἐπὶ τῶν*

6. CLEMENS ALEXANDRINUS reasons almost in the same Manner upon this Example; and I am surprized that our Author has not made Use of that Authority. That Father says that St. *Paul* thus became all Things to all Men out of Condescension; and that without departing from the fundamental Principles of the Christian Religion, he gained all the World by such Management, which cannot be treated as Falseness, properly so called. *Stromat. Lib. VI. Cap. XV. p. 802. Edit. Oxon.*

7. Thus St. CHRYSOSTOM says it ought to be called, and not *ἀπάτην Deceit*, in his first Book *De Sacerdot.* And again, the same Author upon *1 Cor.* iv. 6. *This was no Cheat but a certain Compliance and Condescension.* And again, on ix. 20. *That he might convert those that are really so, he became such in Appearance only, and did the same Things as they, but not with the same Intention.* To this we may refer the counterfeit Madness of *David*, (*1 Sam.* xxi. 13.) GROTIUS.

See a Passage of St. CYRIL, which will be cited below, § 13. *Note 2.* and that of CLEMENS ALEXANDRINUS quoted in *Note 6.*

πλησίων ὀφελεία μόνη ποιήσει τινὰ ἂ οὐκ ἂν προηγουμένως αὐτῷ παραχθείη, &c. ⁸ *He will do some Things for the Benefit of his Neighbour, which otherwise he would not of his own free Will, and first Intention.* Such

^b *Liv. Lib. 5: c. 48.* was the Act of the *Romans*, ^b who when they were besieged, threw Loaves of Bread from the Capitol, into the Enemies Camp, that they might not be thought to have any want of it.

^c *See Sylvest. verb. Bellum. Part 1. n. 8.* An Example of the other Case, is the pretended Flight of *Joshua* ^c before the Inhabitants of *Ai*, which is often practised by other Generals. For we suppose here the consequent Harm to be lawful, from the Justice of the War. But such a pretended Flight signifies nothing by Institution, tho' the Enemy may take it as a Sign of Fear, which the other is not bound to guard against, using his own Liberty of going this way or that way, faster or slower, and with such or such a Countenance, as he pleases. The same Thing may be said of those, who use the Enemies Arms or Habits, or set up his Standards or Flag, as we read in many Histories.

For all these Things every Man may make use of, as he pleases, tho' contrary to the general Custom; because that very Custom is established by the Pleasure of particular Persons, not as by common Consent, and therefore obliges none. <526>

IX. Of that in the latter Sense, the Question is difficult.

IX. There is a greater Dispute concerning those Signs which enter, if I may say so, into the Commerce of Men, and in the wrong Use of which a Lye does properly consist; much is found in Holy Writ against Lying, *A righteous Man hateth Lying*, Prov. xiii. 5. *Remove far from me Falshood and Lyes*, Prov. xxx. 8. *Thou shalt destroy all those that speak Lies*, Psal. v. 7. *Lie not one to another*, Colos. iii. 9. And this St. *Austin* stiffly defends; with him agree many Poets and Philosophers. Remarkable is that of *Homer*,

8. These Words that our Author quotes without mentioning the Place from which he takes them, are in *Stromat. Lib. VII. Cap. IX. p. 863. Edit. Oxon.* a little after the Passage, which he cites below, § 14. *Note 10.* in as loose a Manner. The Father speaks in both of his *Gnostick*.

¹ *Hated to Death may that grand Villain be,
Whose Heart and Tongue do ever disagree.*

And *Sophocles*,

² *'Tis never handsome to report a Lye;
But if on Truth a certain Mischief wait,
You may dissemble.*

And *Cleobulus*,

³ *The truly wise abhor a shameful Lie.*

⁴ *Aristotle* said, κατ' αὐτὸ τὸ μὲν ψεῦδος, φαῦλον καὶ ψεκτὸν, τὸ δὲ ἀληθὲς καλὸν καὶ ἐπαινετὸν, *Lying in itself is vile and base, but Truth is beautiful and commendable.* Neither does the other Side want its Defenders: As first in Holy Writ, ⁵ it has the Precedents of Men, whose

IX. (1) Ἐχθρὸς γὰρ μοὶ κείνος, &c.
Iliad. Lib. IX. Ver. 312, 313.

2. Καλὸν μὲν οὖν, &c.

This is a Fragment of a Tragedy that is lost, intitled *Creusa*, preserved by STOBÆUS, *Florileg.* Tit. XII.

3. Ψεῦδος δὲ μισεῖ πᾶς ὁ φρόνιμος καὶ σοφός

STOBÆUS has also preserved us this Verse in the same Place, *Tit.* XII. where is also another very like it, which immediately follows, attributed by the common Editions to MENANDER; but in that of our Author, which he revised upon the Manuscript it is called anonymous.

Ψεῦδος δὲ μισεῖ πᾶς σοφὸς καὶ χρήσιμος

4. *Ethic. Nicomach.* Lib. IV. Cap. XIII. p. 55. C. Vol. II. *Edit. Paris.*

5. St. IRENAEUS tells us, he was taught this Maxim by an old Priest; that we ought not to condemn those Things which the holy Scriptures relate simply, without censure: *De quibus Scripturae non increpant, sed simpliciter sunt positae, nos non debere fieri accusatores*, Lib. IV. Cap. L. GROTIUS.

The Maxim laid down by this good Priest so generally, is undoubtedly false. But it is certain that of all those Things, on which the Scripture decides nothing clearly and incontestably in regard to their Nature, there is not one, whereof we find so many Examples in holy Writ, as of those innocent Lies, practised by virtuous Persons without scruple of Conscience. Besides, as MOSES AMYRAUT observes in his *Christian Morals*, "There are many Places where the Faults of the faithful are related without

Probity is commended, who nevertheless have sometimes lied, without being any where blamed for it: As also the formal Decision of many antient ⁶ Doctors of the Christian Church, as *Origen, Clemens, Tertullian, Lactantius, Chrysostom, St. Jerome and Cassianus*; and indeed almost all of the primitive Christian Writers, as *St. Austin* ⁷ himself confesses, herein dissenting from them, but owning ⁸ *it to be a very difficult and intricate Question, and by the Learned variously disputed*, for these are his very Words.

Among the Philosophers, the open Maintainers of this Opinion are *Socrates*, ⁹ and <527> his Disciples ¹⁰ *Plato* and ¹¹ *Xenophon*; as also ¹²

blame in the Word of GOD; but it is only in the History of these officious Lies, that the Holy Spirit has commended them, in regard to *Rahab* and the Midwives of *Egypt*, who were praised and rewarded." *Vol. III. p. 283.*

6. Some of those Passages will be cited below.

7. He confesses this in his Questions upon LEVITICUS: *Sed utrum haec aliqua compensatione, &c.* Quaest. LXVIII.

8. *Magna quaestio, latebrosa tractatio, dispensatio inter doctos alternans.* De Mendacio, *Cap. I.* Our Author himself, after the first Edition of his Book, in a Letter wherein he asks the Advice of the celebrated GERARD JOHN VOSSIUS, concerning a new Edition he was preparing, confesses that the Question about Lying was one of those that puzzled him most: *Aestuo enim in nonnullis quaestionibus, maxime illa de Mendacio, &c.* Part I. Epist. CCXVIII. But this Difficulty arose from his not knowing perfectly the Topick of the Question, because he had not sufficiently dived into the Nature of the Thing, and the simple Principles of natural Right.

9. It is XENOPHON who has preserved the Thoughts of that great Philosopher, in his *Memoirs* of his remarkable Actions and Sayings. He makes *Euthydemus*, with whom he discourses, agree, that there is no Injustice either in deceiving an Enemy or even a Friend for his good: And he proposes, by way of Example, a General of an Army, who to raise the drooping Courage of his Soldiers, tells them, that Aid will soon arrive; tho' he knows that it is not true; and a Father, who seeing his Son's Aversion for a Remedy necessary to his Health, makes him take it by way of Food, *Lib. IV. Cap. II. § 16, 17.*

10. Some Passages of this Philosopher will be cited below, upon Paragraph XV. *Note 2, 4.*

11. The Passage cited in *Note 9.* suffices to shew the Opinion of this Philosopher, who, as the Disciple of SOCRATES, approved without doubt all the Sentiments of his Master which he has given us. See also those cited above, upon § 6. *Note 6.*

12. *Alicubi* CICERO, says our Author. See the Passage, which he cites below, *Note 15.* and those recited in PUFENDORF, *B. IV. Chap. I. § 21.* with what I say there in *Note 1.*

Cicero; and, if we believe *Plutarch*¹³ and¹⁴ *Quintilian*, the *Stoicks*, who reckon this among the Accomplishments of a wise Man, to lie in a proper Place and Manner. Neither does¹⁵ *Aristotle* himself seem to differ from them in some Places, whose *καθ' αὐτὸ*, *in itself*, which we have cited, may be interpreted commonly speaking, or the Thing considered in itself, without respect to Circumstances. His Expositor, *Andronicus Rhodius*, said thus of a Physician that told a Lye to his Patient,¹⁶ *ἀπατᾷ μὲν, ἀπατεῶν δὲ οὐκ ἐστὶν*, *He deceives indeed, but yet he is not a Deceiver*. And he gives the Reason, *οὐ γὰρ τέλος ἔχει τὴν ἀπάτην τοῦ νοσοῦντος, ἀλλὰ τὴν σωτηρίαν*, *Because he has no Design to deceive his Patient, but to cure him*.¹⁷ *Quintilian* before mentioned defending this Opinion said, Many Things are honest, or dishonest, not simply from the Fact, but from the Motives of it. So¹⁸ *Diphilus*,

*If a kind Lye the Life of Man can save,
Where is the Crime to rescue from the Grave?*

13. *De Stoicorum repugnant*. p. 1055, 1056. Vol. II. *Edit. Wech*. The Opinion of these Philosophers may be seen explained at large in *STOBAEUS, Eclog. Ethic. Cap. IV*.

14. This Orator gives by way of Example the small Lies told to a sick Child; those invented to preserve the Life of a Person fallen into the Hands of Robbers, or to deceive an Enemy, when the Safety of a Man's Country requires it: *Ac primum concedant mihi, &c.* *Instit. Orat. Lib. XII. Cap. I. p. 1054. Edit. Burman*.

15. I shall give the Passages quoted by our Author in the Margin, where the Figures are a little faulty in the Editions before mine. The Philosopher speaking of the Vices opposite to *Veracity*, gives as one of the Extremes, the pretending to have advantageous Qualities which we have not, or not to have what we have. *Ethic. Nicomach. Lib. II. Cap. VII. p. 25. Vol. II. Edit. Paris*. By which he gives us to understand, that Feigning and Dissimulation are not always vicious, but only from the Excess or Defect in the Things feigned or disguised. And he says in so many Words in the other Passage upon this Head, that those who dissemble with Moderation, and in Things that are not obvious, pass for polite People, *Lib. IV. Cap. XIII. in fin. p. 56. B*.

16. *Paraph. in Lib. V. Cap. VIII. Ethic. Nicomach. p. 297. Edit. Heins*.

17. *Sic judicet, pleraque esse, &c.* *Institut. Orator. (Lib. XII. Cap. I. p. 1054. Edit. Burm.)* He says in another Place, *Nam & Mendacium dicere, &c.* (*Lib. II. Cap. XVII. p. 127.*) *GROTIUS*.

18. *Ἵπολαμβάνω τὸ ψεῦδος, &c.*

These Verses have been preserved by *STOBAEUS, Florileg. Tit. XII*.

When *Neoptolemus* in ¹⁹ *Sophocles* asked *Ulysses*,

What! not asham'd by Falshood to offend?

Ulysses answered,

No, if our Safety thereupon depend.

The like may be brought out of ²⁰ *Pisander* and *Euripides*; ²¹ so in *Quintilian* also we find, *it is allowable in a wise Man sometimes to tell a Lye.* And ²² *Eustathius* upon the second of the *Odysseys*, said *ψεύσεται κατὰ καιρὸν ὁ σοφὸς, A wise Man will tell a Lye upon Occasion.* He also produces Testimonies out of ²³ *Herodotus* and *Isocrates.* <528>

X. *The Use of Words in another Sense,*

X. These so different Opinions may perhaps be reconciled by the common Distinction of Lies, taken either in a stricter or a looser Sense. For

19. *NE. Οὐκ αἰσχρὸν ἡγῆ δῆτα τὰ ψευδῆ λέγειν;*
ΟΔ. Οὐκ, εἰ τὸ σωθῆναι γε τὸ ψεῦδος φέρει.
Philoctet. Ver. 107, 108.

20. *Οὐ Νέμεσις καὶ ψεῦδος, &c.*

This Verse is also in *STOBAEUS, Tit. XII.*

21. This perhaps is what he makes *Ulysses* say, that, when he was discovered as a Spy in *Troy*, he invented a thousand Things to avoid Death:

EK. Τί δῆτ' ἔλεξας, δοῦλος ὦν ἔμος τότε;
ΟΔ. Πολλῶν λόγων εὐρήμαθ' ὡς μὴ θανεῖν.

Hecub. Ver. 249, 250. In *MR. BARNES's* Collection of Fragments there is one which might be applied here, *Incert. Ver. 73.* But it is *MENANDER's* and is in *p. 208. Ver. 57. Collect. Cleric.*

22. What he calls there *κατὰ καιρὸν*, the Grammarian *DONATUS* expresses by *in tempore*, adding, that some Moralists approve of Deceit when reasonable: *Quamquam & ipsum fallere in tempore, quidam de Officiis scribentes, rectum putant.* In *Adelph. Act IV. Scen. III. (Ver. 18.) CICERO* insinuates, that there are honest and charitable Lies, as those by which we endeavour to save the Life of an unfortunate Citizen: *Si honesto & misericordī salutī civi calamitoso esse vellemus, &c. Orat. pro Ligat. (Cap. V.) GROTIUS.*

23. The Historian makes *Otanes* say; it is necessary to lie when some Reason requires it: *Ἐνθα γὰρ τι δεῖ ψεῦδος λέγεσθαι, λεγέσθω, Lib. III. Cap. LXXII.*

we do not here take the Word *Lye* so largely, as ^a comprehending every Untruth that one says, without knowing it to be such, as *Gellius* ¹ distinguished between *mendacium dicere*, and *mentiri*, to tell an Untruth, and to *Lye*. But here we take it to signify a Falsehood spoken knowingly, in a Sense contrary either to what we think or design. For what is first, *καὶ ἀμέσως*, and immediately declared by Words, or any other Signs, are the Conceptions of the Mind: Therefore he does not lie, who tells a Thing that is false, yet supposing it to be true; but he that tells Truth, at the same Time thinking it to be false, does certainly lye. It is the Falshood therefore of the Expression which is requisite to the common Nature of a Lye. Whence it follows, when any Word or Sentence is *πολύσημος*, of divers Significations, either by common Use, or by the Custom of Art, or by any Figure that is intelligible, then if our inward Meaning agree with any of these Significations, it is not to be reputed a Lye, ² tho' the Person to whom we speak may take it in a different Sense.

than that wherein we know they are understood, not always unlawful.

^a *Thom.* ii. 2. *Quaest.* 110. *Art.* 1. in *Resp.*

X. (1) He cites upon it the Words of P. NIGIDIUS, contemporary with *Julius Caesar*, and CICERO: *Verba sunt haec ipsa P. NIGIDI, &c.* Lib. XI. Cap. XI. St. AUSTIN observes also, that Nobody is guilty of Lying, when he believes what he says to be true: *Ream linguam non facit, nisi mens rea.* De verbis Apostoli, *Serm.* XXVIII. *Nemo mentiens judicandus est, &c.* *Enchirid.* Cap. XVIII. These two Passages are quoted in the CANON LAW, *Caus.* XXII. *Quaest.* II. (*Can.* III. IV.) GROTIUS.

2. Thus *Abraham* when he was going to sacrifice his Son upon the Mountain *Morijah*, said to his Servants: *Abide you here with the Ass; and I and the Lad will go yonder and worship, and come again to you.* In which he spoke ambiguously according to St. AMBROSE, lest, if those People had known his Design, they should have endeavoured to hinder him from executing it, or importuned him against it with Cries and Tears. *Captiose autem loquebatur, &c.* Lib. I. *De Abrahamo*, (Cap. VIII.) That Father of the Church approves the Patriarch's Conduct, and GRATIAN after him, *Caus.* XXII. *Quaest.* II. post *Can.* XX. GROTIUS.

This Example includes more than a simple Ambiguity. "Every one sees that if *Abraham* did not speak contrary to his Desire, he spoke at least contrary to his Hope, and by his Words put other Ideas into the Minds of his Servants, than he had in his own, as AMYRAUT says very well, *Morale Chretienne.*" Vol. IV. p. 523. It does not suffice in order to say there is no Lie, that the Words we use are susceptible of a Sense which answers to what we think; it is moreover necessary, that in the present State of Things, and the manner the Persons to whom we speak, are disposed, they have room to take our Words in that Sense; otherwise a Door would be opened for Deceit in Relation to Affairs, wherein all the World agrees, that we ought to speak sincerely what we think. This our Author was well aware of, since he observes immediately

But these ambiguous Expressions are not rashly to be allowed, but yet may upon Occasions be justified. As if it relates to the instructing of one committed to our Charge, or to avoid some captious Questions. ³ Of the former CHRIST gave us an Example in himself, when he said *our Friend Lazarus sleepeth*, John xi. 11. which his Disciples understood of his taking rest in Sleep. And when he said, *John ii. 20, 21. Destroy this Temple, and in three Days I will raise it up*, meaning that of his Body, he knew very well that the *Jews* understood it of the real Fabrick of the Temple. So again, when he promised his Disciples, *Luke xxii. 30. That they should sit on twelve Thrones, judging the twelve Tribes of Israel*; and *Mat. xxvi. 25. That they should drink new Wine with him in his Father's Kingdom*, he knew very well, that they understood it of a Temporal Kingdom, whereof they were full of Hopes even to the very Moment of his Ascension, *Acts i. 6. Thus he speaks to the People in Parables, that hearing they might not understand*, Mat. xiii. 3. that is, unless they came with such Attention and Docility (or Willingness to be <529> taught) as was requisite. An Instance of the latter Case we

after, *talem locutionem usurpatam temere non probandam*. See PUFENDORF, § 13. of the Chapter which answers to this. Now could *Abraham's* Servants, ignorant as they were of the Order of Heaven to that Patriarch, ever imagine, that the Words *we will come again to you*, could mean only the Father, and not the Father and Son, whom *Abraham* mentioned just before? I go farther to maintain, that tho' the Words are conceived in such a manner, that those to whom they are spoke could with good Attention, see thro' the Ambiguity, and know the Sense that the Speaker has in his Mind; if however the latter has Reason to believe, that they will take them in a Sense quite different from his Thoughts, it is then, with regard to them, a downright Lie, since it produces the same Effect as if he had used Terms, that were susceptible only of one Sense, contrary to the Thought of him that employs them. So that not only *Abraham*, and many other holy Persons, but also our Saviour JESUS CHRIST, having used, as our Author observes a little lower, Expressions, which they well knew, would be understood in a different Sense from what they had in their Minds; hence results, I conceive, an invincible Argument against those of the contrary rigid Opinion, who assert, that we are always guilty of a criminal Lie, when we speak, or act, in a manner, whereby we would make others understand something different from our own Thoughts. It signifies nothing to say, that it was for a good End our Saviour spoke in this manner; for the End does not make the Use of a Means, bad in itself, innocent.

3. See my Reflection upon the preceding *Note 2*.

meet with from prophane History in the Person of *L. Vitellius*, who being importuned by *Narcissus* to explain himself, and to speak freely (in regard to the loose Life of *Messalina*) would not be prevailed upon, but still gave such doubtful and uncertain Answers, ⁴ as would admit of various Senses. Hither we shall refer the *Hebrew Saying*, ⁵ מוטב ראה לא ושתוק אם יודע אדסלחמיד עתדברג *If a Man can speak ambiguously let him, if not, let him say nothing.*

3. † On the contrary it may happen, that to use this kind of speaking may not only be discommendable, but wicked, ⁶ as when either the Honour of GOD, ⁷ or our Charity to our Neighbour, or Reverence to our Superiors, or the Nature of the Thing in Question requires, that we should plainly declare the Truth; so in Contracts (as we have said ^b al- ^b B. 2. c. 12. § 9.

4. *Instabat quidem Narcissus, &c.* TACIT. *Annal.* Lib. XI. (Cap. XXXIV. Num. 2.) The same Historian says, that there are many People, who express their meaning in ambiguous Terms, that they may afterwards have it in their Power to explain them according to their Interest. *Non, ut plerique incerta disseruit, &c.* *Histor. Lib.* III. (Cap. III. Num. 2.) He gives elsewhere an Example of it in the Person of *Mucianus*, Governor of *Syria*, who writing to the Generals *Antonius Primus* and *Arrius Varus* sometimes talked to them of the Necessity of hastening the Execution of the concerted Projects, and sometimes of the Advantage, that would arise from delaying it; composing his Discourses in such a Manner, that he might according to the Event either condemn the Generals, if unsuccessful; or arrogate Honour to himself, if otherwise: *Namque Mucianus tam celeri, &c.* *Ibid.* (Cap. LII. Num. 3.) GROTIUS.

5. And also this מיחר השלים מפנו לשנוח *One may speak ambiguously for Advantage, quoted by MANASSES BEN-ISRAEL, In suo Conciliat. Quaest.* 27. and St. CHRYSOSTOM, *he is also called a Deceiver, that uses such a Thing to injure one, not be that does it to a good End.* *De Sacerdot. Lib.* I. GROTIUS.

† [[This is the only numbered paragraph in the English edition; in the Latin, the other paragraphs in this chapter are also numbered.]]

6. PHILO of the Life of MOSES, *I speak of Facts that relate to the Honour of GOD, in which only we ought to speak Truth, even if a Man were otherwise given to Lying; for Truth is the Attendant of GOD;* and St. AUSTIN, *Epist.* VIII. It is one Thing to know, *Whether a good Man may sometimes lye;* and another *Whether a Writer of the Holy Scriptures should lye.* See hereafter, § 15. (Num. 2.) GROTIUS.

7. AESCHYLUS in his *Prometheus, λέξω τρωῶς, &c.* (p. 39. Edit. H. Steph).

*I'll shew you plainly what you want to learn,
Nor will I wrap in dark Disguise the Truth;
But tell it with a Frankness that the talk of Friends
Does always justly claim.* GROTIUS.

ready) whatsoever the Nature of the Contract requires to be understood, should be declared. In which Sense we may very well understand that of *Cicero*,⁸ *That a Lye should be banished from all human Commerce*, borrowed from the old *Attick Law*,⁹ *No lying in a Market*. In which Places the Word *Mendacium* is to be taken so largely, as to include even obscure Expressions, which we, properly speaking, do not comprehend under the Notion of *Lying*.

XI. *The form of a Lye, as it is unlawful, consists in a Repugnancy to another's Right. This explained.*

XI. 1. It is then required to the common Notion of a Lye, that what is either spoken, written, intimated by Characters, or declared by any Gesture, cannot be otherwise understood than in such a Sense¹ as differs from the Mind of the Person who expresses it; but to a Lye strictly taken, as it is naturally unlawful, there is necessarily required some peculiar Difference; which if rightly considered, at least according to the common Opinion of Nations, can be nothing else than, the Violation of a real Right, and that subsisting without any Diminution, belonging to him, to whom we make a Sign, or direct our Discourse. For it is certain, that in Respect of himself, let him speak ever so falsely, no Man can lye. I do not here mean every Right, and what is foreign to the present Affair; but that Right which is proper and essential to the Matter in Hand, which is nothing else,² but the Freedom of him, with whom we discourse to judge of the Conceptions of our Minds, a Freedom which, as by a silent Contract, we are supposed to owe him.³ For this, and no

8. *Tollendum est igitur ex rebus contrahendis omne mendacium. De Offic. Lib. III Cap. XV.*

9. DEMOSTHENES speaks of this Law. *Orat. adversus Leptin.* p. 363. A. Edit Basil 1572.

XI. (1) See what I have said upon *Note 2.* of the preceding Paragraph.

2. Wherefore he that deprives a Man of the Means of knowing certain Things, is said in the *Hebrew Tongue*, *Furari cor, to steal away his Heart*. See GENES. Chap. XXXI. Ver. 26, 27. with the *Chaldaick* Paraphrase of ONKELOS, and the Version of the LXX. See also the Rabbi DAVID in his Book *De Radicib.* The Rabbi SOLOMON in his Commentary, and ABEN EZRA another Rabbi. GROTIUS.

3. Our Author said a little lower in his first Edition, *That the Obligation Men are under to discover to each other by their Words what they have in their Thoughts, arises from a tacit, tho' not particular Convention; and which is made only when they begin to speak, as in the Case of Promises: But from a Kind of general and antient Convention;*

like that, which we have said above, took place in the Establishment of Property, with regard to the Restitution of Things belonging to another, which we have in our Hands: A Convention however, which is of such a Nature, that the Compensation of a Debt, and other such Things hinder it from having its Effects. These Words, which are retrenched in the later Editions, serve for our better comprehending the Ideas of our Author. He finds the Obligation we are under to speak Truth, upon the tacit Agreement Men entered into amongst themselves, in introducing the Use of Speech, that this, and other such Signs, should be used, so as to make known reciprocally what they thought. But this Agreement is no better founded than the other with which he compares it, and of which we have shewn the Uselessness in the Notes upon PUFENDORF, *Law of Nature and Nations*, B. IV. Chap. XIII. § 3. *Note*. 1. The Establishment itself of the Signification of Words, tho' it is made by a kind of Consent of Mankind, is not made by a Convention properly so called, and of an obligatory Force, as we have proved in the same Notes, B. IV. Chap. I. § 1. *Note* 1. And it is not at all necessary to suppose, that Men have agreed amongst themselves to manifest their Thoughts to each other by the Use of Words, and that in a manner proper for making them known. Men being often obliged to communicate their Thoughts reciprocally, in order to discharge what they owe to each other; and having no other Means to do that, than Words used in a certain Sense, which is generally the most common; it follows from that alone, that they ought to make such an Use of them, by Virtue of the known and incontestable Rule, that whoever is bound to procure an End, is also bound to employ the Means necessary to obtain that End. Neither, in my Opinion, is there any need to suppose, that when we begin to speak to another, we make a particular Agreement, by which we profess our Consent to enter into the general Agreement. Which however is pretended by the ingenious Author of a Piece, published in the JOURNAL LITERAIRE of the *Hague*, Vol. V. Part II. p. 256 & seq. which the Reader will do well to peruse, and wherein the vicious Extremes are avoided. But it seems to me more simple to say, without so many turnings and windings, that the Question about Lying is reduced to this, whether there be always some Reason, which obliges us to make known our Thoughts to those with whom we discourse: For suppose there are Cases, in which there is no such Obligation, we may then make what Use we please of Speech. Now the greatest Partisans of the rigid Opinion, confess, that we may sometimes conceal what we think from others; and thence it is, that they would have us get off either by saying nothing, or by declaring we will not speak what we think. Now what does it signify to others in those Cases, whether they are left in their Ignorance, or made to believe Things which are not? When the Question is about any Thing, which we are not obliged to tell them, it is the worse for them if they rely upon our Words; and much more when there is good Reason to hinder their knowing what we think. So that there being many Cases, wherein neither the Laws of Justice, nor those of Humanity or Charity, lay us under any Obligation to discover our real Thoughts to others, it is often allowable to disguise them, without the Inconveniences I have spoken of in my great Note upon PUFENDORF, B. IV. Chap. I. § 7. *Note*. 1. on account of which we ought not to indulge ourselves in it, but for some considerable Reason; yet those Inconveniences do not hinder, but that there

other, is <530> that mutual Obligation, which Men intended to introduce by establishing the Use of Speech, and such other Signs; for without that such an Establishment had been to no Purpose.

2. It is also requisite, that this Right to judge should subsist without any Diminution, while we discourse. ⁴ For it may happen, that tho' there were such a Right, it ceases or may be taken away, by some other supervening Right, as a Debt may cease by an Acquittance, or Non-Performance of some Condition. It is moreover required, that the Right that is violated be his, with whom we discourse, and not any other's; as in Contracts there arises no Injustice, but by the violating the Right of the Contracters. Hence perhaps it is, that after *Simonides*, *Plato* ⁵ refers the speaking of Truth to Justice; and that the Lying which is forbidden, Holy Writ often describes by bearing ⁶ false Witness against our Neighbour, and what ⁷ St. *Austin* himself puts into the Definition of a Lye, ⁸ *A Purpose to deceive*; and *Cicero* ⁹ will have the speaking of Truth referred to the Fundamentals of Justice.

3. But as this Right may be taken away by the express Consent of him, with whom we deal; as if any one shall declare before hand that he will

may be certain Cases wherein we not only may, but ought to use some innocent Falshood either to procure ourselves or others some great Good, or to avoid some great Evil. The Advantage of human Society makes both the one and the other equally requisite.

4. All this is manifestly superfluous according to the System laid down in the foregoing Note.

5. The Passage has been cited before, *B. II. Chap. XI. § 1. Num. 8.*

6. In all the Editions without excepting the first, the Text here has only, *Describunt testimonio sive elocutione adversus proximum*. But it is plain, that either the Copist, or the Printers, have left out the Word *falso*, which is absolutely necessary to denote the Idea of Lying in the Expression of the Scripture, of which the Decalogue gives us an Instance in the ninth Commandment. I have therefore ventured to correct this evident Omission in my Edition of the Original.

7. The Passage is: *Omnis autem, qui mentitur contra id quod animo sentit, loquitur voluntate fallendi*. *Enchirid. Cap. XXII. This is recited in the Canon Law, Caus. XXII. Quaest. II. Can. IV.*

8. *A Christian should never tell a Lye, with a Design to deceive or hurt: Ut non mentiatum umquam.* &c. *LACTANT. Institut. Lib. VI. Cap. XVIII. (num. 4. Edit. Cellar.) GROTIUS.*

9. *Ut reddere depositum, &c. De Offic. Lib. I. Cap. X.*

speak false, and the other allows it, so also by a tacit Consent, or a Presumption founded upon just Reason, or by the Opposition of another's Right, which by the Judgment of all Men is far more considerable; from these Principles rightly understood many Inferences may be drawn, which may be of Use to reconcile those different Opinions formerly mentioned. <531>

XII. *First*, when we talk to Children or Madmen, if what we say be false, yet it cannot be reputed a criminal Lye. Because it is generally allowed,

¹ *Ut puerorum aetas improvida ludificetur.*

That imprudent Youth may be thus deceived.

And ² *Quintilian* says, speaking of Children, *We make them believe many Things for their Advantage.* But the immediate Reason is, because Children and Madmen not having a freedom of Judgment, they cannot be injured in that Liberty which they have not.

XIII. *Secondly*, whilst we discourse with one Man that is not deceived, if a third Person be thereby deceived, it is no Lye; no Lye in Respect of him to whom it was spoken, because his Judgment continues unperverted, as does his who hearing a Fable, takes it as such, or his who hears a figurative Speech, whether *κατ' εἰρωνειᾶν* by way of Irony, or *καθ' ὑπερβολήν*, by an Hyperbole, which Figure brings us to the Truth ¹ by

XII. *That it is lawful to speak what is false to Children and Madmen.*

XIII. *Also when he is deceived, to whom our Speech is not directed, and whom without Speech we may lawfully deceive.*

XII. (1) LUCRET. *Lib. I. Ver. 939.*

2. The Passage in which this is has been cited above, § 9. *Note 13.*

XIII. (1) *In hoc omnis hyperbole extenditur, ut ad verum mendacio veniat ——— incredibilia adfirmat, ut ad credibilia perveniat.* De Benefic. *Lib. VII. Cap. XXIII.*

The Passage of *QUINTILIAN*, is in *Institut. Orator. Lib. VIII. Cap. VI.* towards the End. But in *OBRECHT's* Edition, in which he follows that of *Oxford*, and has corrected it exactly after several Manuscripts, it is read, (*p. 500.*) in a manner that conveys a quite different Sense. *Est haec DECENS sermonis superjectio.* That is to say, the *Hyperbole* is a reasonable Exaggeration, or which is not carried too far. The last Editor, Mr. *BURMAN*, only recites the various Readings, most of them evidently faulty, of the Manuscripts and Editions. Had *OBRECHT* found his in some Manuscript, it ought certainly to be preferred to all others. But, to consider it only as a Conjecture, it may be easily drawn from the Vestiges of those corrupt Readings, and is confirmed by

something which is not true; as *Seneca* speaks, and *Quintilian* calls it, *A lying Exaggeration*. Neither is it a Lye in respect of him, that hears it by the by; because he is not concerned in the Discourse, and therefore we are not any ways obliged to inform him right; but if that Person mistake our Meaning, he may thank himself, and not any Body else, for his being deceived. For (if we consider it rightly) the Discourse between ourselves is no Discourse at all in respect to a Stander by, but a meer Sound that may indifferently signify any Thing. Therefore neither was *Cato* the Censor to be blamed for ^a promising Assistance to his Confederates, tho' falsely, nor *Flaccus* ^b in reporting to others, that *Aemilius* had taken the Enemies City by Storm; tho' the Enemies were deceived by it. *Plutarch* relates the like of *Agésilauus*. For nothing was here said to the Enemy, and the consequent Damage was an accidental Thing, and not in itself unlawful to wish, or cause to an Enemy. And to this Kind do ² St. *Chrysostom* and St. ³ *Hierom* refer that Saying ^c of St. *Paul*, wherein he re-proved St. *Peter* at *Antioch* for too much judaizing, supposing that St. *Peter* well understood, that he did it not seriously, but to accommodate himself to the Weakness of those who heard him.

^a *Liv.* l. 32.

c. 12.

^b *Appian.* Bell. Hispan. p. 513. Edit. Amst. (301. *H. Steph.*)

^c *Galat.* ii. 14.

XIV. *And when our Speech is directed to him, that is willing to be deceived.*

XIV. 1. *Thirdly*, When we are certain that he with whom we discourse will not only not be offended, tho' his Judgment be for that Time imposed upon, but on the contrary will be thankful for it, on account of the Advantage, that he shall get by it, there is no Lye properly so called,

what *QUINTILIAN* says afterwards: *Sed hujus quoque rei servatur mensura quaedam. Quamvis enim est omnis Hyperbole ultra fidem, non tamen esse debet ULTRA MODUM — nec ita ut mendacio fallere velit. Quo magis intuendum est, quousque DECEAT extollere, quod nobis non creditur*, p. 753. Edit. Burman.

2. Add also St. *CYRIL* in his Work against the Emperor *Julian*, Lib. IX. *in fin.* ["St. *PETER* did not differ in Opinion with St. *PAUL*: But by adapting his Conduct to Occasions, he endeavoured to obtain by all Sorts of Methods the Advantage of those, who were desirous of being his Disciples. Whereas St. *PAUL* acting in a uniform Manner, thought himself obliged to give St. *PETER* Advice upon that Head; lest the Intention of the latter should not be understood, and some should take Offence at his Behaviour." P. 325. C. D. Edit. *Spanheim.*] *TERTULLIAN* is almost in the same Opinion, *Lib. I. contra Marcion* (Cap. XX.) and *Lib. IV. (Cap. III.) Lib. V. Cap. III.* [Add also, *De praescript. advers. Haereticos*, Cap. XXIII.] *GROTIUS*.

3. See his Letter to St. *AUSTIN*, Vol. II. p. 336. & seq. Edit. *Froben.*

or unjust Deceit, committed, no more than he can be charged with Theft, who presuming the Owner's Consent spends something of his of small Value to obtain him a great Profit. For in such Cases, where we have so much Reason to be assured of what we think, a Presumption of another's Will has the same Force as an express Consent. And it is an incontestable Maxim that *no Wrong is done to him that is willing*. Wherefore a Person seems <532> not to be culpable, when he comforts his sick Friend, by making him believe what is false, as *Arria* did *Paeteus* upon the Death of their Son, which Story is in ^a *Pliny's* Epistles; or he that in a Danger encourages the Soldiers with false News, whereby he occasions their Safety and Victory; and so the deceived is not caught, as *Lucretius* speaks.

^a *Lib. 3. Epist.*
16. n. 3, 4, 5, 6.

2. And ¹ *Democritus*, ἀληθομυθεύειν χρεών, ὅπου λώϊον *We must speak Truth, when it is for our Interest*; and *Xenophon*, ² φίλους δίκαιον ἔξαπατᾶν, ἐπὶ δὲ ἀγαθῶ, It is lawful to deceive our Friends, for their Advantage; and ³ *Clemens Alexandrinus* allows, ψεύδεσθαι ἐν θεραπείας μέρει, To use a Lye for a Remedy: ⁴ So *Maximus Tyrius*, καὶ ἰατρος νοσοῦντα ἔξαπατᾶ, καὶ στρατηγὸς, καὶ κυβερνήτης νάντας, καὶ δεινὸν οὐδὲν, *The Physician deceives his Patient, the General his Soldiers, and the Pilot his Mariners, and yet no Injury*. And *Proclus* ⁵ on *Plato* gives this Reason, τὸ γὰρ ἀγαθὸν κρεῖττον ἐστὶ τῆς ἀληθείας, *Goodness is preferable*

XIV. (1) This Saying is preserved by *STOBAEUS*, *Florileg.* Serm. XII.

2. I do not know from whence our Author took these Words. The Passage cited above, § 9. *Note* 9. includes the Sense, but not in the same Terms.

3. He maintains, that in this Case it is rather *telling a Lie* than *Lying*, and alledges the Example of a Physician who deceives his Patient in order to cure him. *Stromat.* Lib. VII. Cap. IX. p. 873. *Edit. Oxon.* See a like passage of *ORIGEN* which *GRONOVIVS* relates upon § 9. and what *PHILO* says, *De Cherubim*, p. 110. D. *Edit. Paris.* a Passage which I find also quoted by the Bishop of *Oxford*.

4. *Dissert.* III. p. 30. *Edit. Cantab. Davis.* St. *CHRYSOSTOM*, *Lib. I.* alledges also the Example of Physicians. *GROTIUS*.

5. There is the same Thought in this Verse of *MENANDER's*:

Κρεῖττον δ' ἐλέσθαι ψεύδος, ἢ ἀληθὲς κακόν
Ex incert. Comoed. apud STOB. Tit. XII.

to Truth. The like we have in *Xenophon*,⁶ that their Confederates were coming to their Assistance; and of *Tullus Hostilius*, that^b he ordered the *Alban Army* to withdraw, in order to surround the Enemy; (tho' he knew it was an Effect of the *Alban General's Treachery*) and that *Salubre Mendacium*,⁷ that *wholesome Lye* of *Quinctius* the Consul (as Historians call it) to encourage his Army, gave out, that his left Wing had routed their Enemies; and of many others. But we must observe, that the Injury done to the Judgment in this Case, is of less Concern, because it is but as for a Moment, and the Truth immediately appears.

^b Liv I. I. c. 27.
n. 8.

XV. And when
he that speaks,
uses that Sovereign
Power that
he has over his
own Subjects.

XV. I. *Fourthly*, Another Consequence which has an Affinity with the former is this, that it is not a criminal Lye, when he who¹ has an absolute Right over all the Rights of another, makes use of that Right, in telling something false, either for his particular Advantage, or for the publick Good. And *Plato* seems to have respect to this,² when he allows Princes the Liberty to speak false. And yet³ when he sometimes grants, and sometimes takes away this Privilege to, and from Physicians, he seems to make this Difference, that he gave it to the publickly authorized ones, and took it away from such as assumed it to themselves. Yet the same

6. And when Agesilaus came into Boeotia, and there understood that Pisander was vanquished in a Sea fight by Pharnabazus and Conon, he published the contrary in his Army, and putting on a Crown, offered Sacrifices for the Victory. PLUTARCH in the Life of Agesilaus, p. 605. C. GROTIUS.

7. Et Romani, quia paucitas, &c. Liv. Lib. II. Cap. LXIV. Num. 6.

XV. (1) HOMER tells us, that *Agamemnon*, General of the *Greeks*, in order to sound his Army, pretended that he would have them return Home, and he speaks of this Feint as of an innocent Artifice, allowable for him to use:

Πρώτα δ' ἔγών ἔπεισω, &c.

Iliad. Lib. II. Ver. 73, 74. GROTIUS.

But it is another Question, whether the Feint of that General was seasonable or not; on which Point, as well as many others, the Abbé TERRASSON has cut out Work enough for the excessive Admirers of HOMER, in his judicious *Critical Dissertation upon the Iliad*, Vol. I. p. 357. & seqq.

2. *De Repub*. Lib. III. p. 389. B.

3. But see what I have said upon PUFENDORF, *Law of Nature and Nations*, B. IV. Chap. I. § 17. Note I. Second Edition.

Plato does justly acknowledge,⁴ that it is not suitable to the Nature of GOD to lye, notwithstanding the Sovereign Power that he has over Men, because it is an⁵ Argument of Weakness to fly to such Shifts. <533>

4. That Philosopher thus proves, that it is not consistent with the Divine Nature to lie. GOD, says he, has no Occasion to lie, either to represent like the Poets, antient Things under ingenious Fictions, as if he was ignorant how all Things have passed: Or to deceive his Enemies, as if he feared them: Or to prevent the Effects of the Folly of his Friends; for no foolish or mad Person is the Friend of GOD. *De Repub.* Lib. I. p. 382. D. E. Vol. II. *Edit. H. Steph.*

5. For GOD, having an infinity of Means for the Attainment of his Ends, has no need of this to which Men are obliged to have recourse, because they cannot otherwise effect certain Things they propose to themselves. From whence it appears that Men are no more obliged to imitate GOD in this Respect, than to desire to be omnipotent like him. This might suffice to answer the specious Objection which is deduced from the Example of the Supreme Being, and which opens a fine Field for Declamation. But let us say something more, in Order to set the Weakness of such an Argument in its full Light. It is with Pleasure I find that the learned and judicious Mr. NOODT has answered this Difficulty in a few Words, in an Addition made by him to the second Edition of his Treatise, *De forma emendandi doli mali, &c.* "It will be objected, says he, that GOD, whose Perfections Men ought to imitate as much as possible, is true in his Words. Be it so; but who does not know, that the same GOD, who is true, is also, above all Things, a Lover of the Good and Preservation of Mankind? Why therefore should not Man, to whom the Example of GOD is proposed, continually labour to make himself useful in all Respects to the Rest of his Species; if that can be, by telling them the Truth; if not, by using Disguise and Dissimulation necessary to their Good?" Let us add some Reflections, which will serve more clearly to shew, that those who make the Objection under Consideration, extend too far what is here truly imitable in the Divine Perfections. The Veracity of GOD engages us to love Truth; but not all Sorts of Truths; and still less to speak always whatever is true. We are obliged to love and seek after those Truths only which are useful in Regard to our Condition; as for those which are not so, we may neglect them, and are even obliged to do so sometimes, because the searching after them would injure the Knowledge of useful Truths. When we have discovered these useful Truths, we ought to communicate them to others; but we are not obliged to do it at all Times, and in all Places: There are Conjectures wherein the Discovery of this Kind of Truths would produce no good Effect, or even sometimes occasion more Hurt than Good; they may then be concealed. Our Saviour JESUS CHRIST has set us an Example of it, which his Apostles have imitated. If this may take Place in Regard to Truths the most useful to others, why is it not allowable in Relation to Things, of which the Knowledge is of no Service to those we speak to, or which might give them Occasion to hurt either our selves or others, whether with or without Design, and thereby to commit an Imprudence, or a Sin; why, I say, is it not allowable to conceal, not only the Truth, but even to tell them positively something false? It is not necessary to push these

2. An Example of this, perhaps, innocent Falshood we have ⁶ in *Joseph*, and commended by *Philo*, ^a who being Viceroy, pretends, tho' against his Knowledge, to charge his Brethren, first with being Spies, and afterwards Thieves. And in *Solomon*, who gave a remarkable Demonstration of his divine Wisdom, when to discover the true Mother, he commanded the living Child to be divided, when he intended nothing less [*sic*: of the kind]]. 1 *Kings* iii. 25, 26, 27. True is that Saying of *Quintilian*, ⁷ Sometimes the common Good requires that some Falshoods should be maintained.

^a *De Joseph.*
p. 550. & seq.
Ed. Paris.

Reflections any further; those who will consider them without Prejudice, and give Attention to all that has been said above, and in the great Work of PUFENDORF, will easily be convinced, that there is no Subject on which all the Evidence of common sense is more visibly contradicted, than it is by those who maintain the Opinion I oppose. But I cannot help referring the Reader further to some Passages of an Author which I have cited above, and which I again direct to, because, in the Judgment of some People, there are Authorities which add great Force to Arguments, and even sometimes make more Impression upon them than the best Reasons in the World. This Author is MOSES AMYRAUT, whose *Morale Chrétienne* may be seen, *Vol. III.* p. 249, 307. and *Vol. IV.* p. 514, 532. Tho' he has not cleared up the Point so well as has been done since, he has however abundance of judicious Reflections, and solid Answers to divers Objections, deduced either from Reason or the Holy Scriptures. Since I wrote this Note I have an Opportunity to add a more modern Authority, and which will strike no less a great Number of Persons: It is that of the celebrated Mr. SAURIN, Pastor of the *Hague*, in his *Historical, Critical, Theological, and Moral Discourses, upon the most memorable Events of the Old and New Testament*, where he treats of the innocent Artifice of the *Aegyptian* Midwives, tho' he does not venture to determine, whether what they told *Pharaoh* was true, or an officious Lye; he declares however, that admitting the latter, *No one can justly blame their Behaviour, or maintain the Thesis, that they would have acted with more Sanctity, had they observed a different Conduct.* He afterwards rejects, (as I do below, and as I have already done, in my great Note upon the Chapter of PUFENDORF which answers to this) *The Distinction made between their Intention, and the Means they employed to put it in Execution.* Disc. XLIII. p. 7. *Edit. in Octav.* But I know this Author will explain himself still better upon the Question of Lying, in the Sequel of his Work, where, on the Occasion of *Rahab's* History, related in the Book of JOSHUA, he will give the World a Dissertation in Form upon that Subject.

6. CASSIODORUS calls this a wise Dissimulation of Severity. *Quum* fratribus dispensatoria, &c. De Amicitia. GROTIUS.

7. *Non semper autem, etiam si frequentissime, &c.* Institut. Orator. Lib. II. Cap. XVII. p. 131. *Edit. Obrecht.*

XVI. *Fifthly*,¹ When the Life of an innocent Person, or something equal to it, cannot otherwise be preserved, or the Execution of a dishonest Act be otherwise prevented; as was the Fact of *Hypermnestra*,² commended by *Horace*. <534>

*Splendide mendax, & in omne Virgo
Nobilis aevum. Lib. 3. Od. II.*

XVI. Or perhaps, when the Life of an innocent Person, or something equal to it, cannot otherwise be preserved.

XVI. (1) St. AUSTIN on the fifth *Psalm*, related by GRATIAN, in *Caus. XXII. Quaest. II. C. nequis*, *There are two Sorts of Lyes, not much to be blamed, yet not wholly blameless, when we either jest, or tell a Lye to serve our Neighbour. The jocular one is not pernicious, because it does not deceive, for he to whom it is directed knows it was spoken in Jest. And the other, the officious Lye, is the less faulty, because it has in it something of Kindness (or Charity)*. TERTULLIAN, in his Book *De pudic.* among our daily Sins of Infirmity, to which we are all subject, puts also this, *To Lye out of Necessity*. Cap. XIX. GROTIUS.

2. The Commentator says *decently; for it is a brave Thing to lye for Justice*. Like to that of St. CHRYSOSTOM, on *Rahab*, *O excellent Lye! O laudable Deceit! Not of one that betrayed the Interests of Religion, but that did an Act of true Piety*. And St. AUSTIN, of the *Aegyptian* Midwives, *O brave Invention of Humanity! O pious Lye to save Life!* St. JEROME also commends those Midwives, and believes the Rewards given them to be eternal, upon *EZEKIEL xvii.* and *ISAIAH lvi.* St. AMBROSE, on *Syagrius*, B. VI. and St. AUSTIN himself, to *Consentius, Against a Lye*, Cap. XV. varying here, according to Custom, are of the same Opinion. TOSTATUS says there is no Sin in it. And St. AUSTIN doubts of it, B. II. *Quaest. super Exod.* And THOMAS, II. 2. *Quaest. XC. Art. LV. Ad. IV.* And also CAJETAN. See also ERASMUS's *Moriae Encomium*, and the learned MASIUS upon *JOSHUA ii. 5.* GROTIUS.

St. AMBROSE should not be named amongst those, who praise the Conduct of the *Aegyptian* Midwives; for that Father, on the contrary, speaks as if he doubted whether they did well. The Passage our Author had in View is this, *Qui locus, ut superiori utilis ad Hebraeorum salutem, ita reliquo confragosus ad obstetricum fidem, quae didicerunt mentiri pro salute, & fallere pro excusatione*. Lib. VIII. Epist. LXIV. p. 625. A. Edit. Paris. 1569. In regard to *Rahab's* Lye, see what is said upon PUFENDORF, *Law of Nature and Nations*, B. IV. Chap. I. § 16. Note 2. The first Example of the *Aegyptian* Midwives is very remarkable, and furnishes an Argument to which it would be very difficult to say any Thing plausible by Way of Answer. I have spoke of it in the great Note upon Paragraph 7. of the Chapter now cited, and shall add two weak Evasions used, after other Writers, by the late Mr. BERNARD, whose Knowledge and Judgment I otherwise respect, and for which we ought, without Doubt, to honour his Memory. One of these Subterfuges is, that GOD rewards the Actions of Men, tho' imperfect; otherwise he would not reward any; because our best Works are attended with a thousand Imperfections. The other is, that the Rewards conferred upon the Midwives

*A Virgin famous for her pious Lye,
Whose glorious Memory shall never die.*

XVII. *That it
is lawful by*

XVII. 1. What we have now laid down, does not extend so far as the common Maxim of some wise Men, who assert in general, and with-

were proportioned to their Works, which being only materially good, were in Consequence rewarded only with some temporal Blessings. *Discourse upon Lying*, at the End of the Treatise *Of the Excellency of Religion*, Vol. II. p. 813. I say, with Respect to the first of these Answers, that the Imperfection of our Actions, which does not hinder GOD's being pleased with, or rewarding them, does not regard the Nature of the Things we would do, or of the Means employed in Order to succeed; but the Disposition with which we do them. When we do a good Action, and employ only lawful Means to that Purpose, tho' we are not actuated with all the Ardor we ought; and even tho' some human Consideration has a Share in it, GOD, however, approves it, as if there were no Imperfection at all: This is worthy of his Goodness, and does not clash with any of his Perfections. But the Holiness of GOD does not permit him to give the least Sign of Approbation, in Regard to an Action bad in itself, or that has been effected by Means bad in themselves; such as Lying would be, according to the Principles of those against whom we dispute. However good the Intention may have been, that does not hinder the Action, upon the Whole, from being bad, and, consequently, punishable, rather than worthy of Reward. GOD may not punish, and may pardon it, in Consideration of the other Part of the Person's Conduct who has acted thus; but to pretend, that the most holy Being authorizes and approves in the least such an Action, upon Account of the good Intention of the Agent in doing it, is opening a Door for the most pernicious Maxims of the loosest Morality. So that those who affect to be so rigid on the Question of Lying, run into an extreme Looseness of Principle, without perceiving it. The other Subterfuge, to which they have Recourse on this Occasion, is no less frivolous. Does the Nature or Degree of the Reward prevent its being a Reward; and, consequently, a Thing which necessarily supposes an Approbation? And where do we find, that the temporal Blessings with which GOD vouchsafes to reward Men, are dispensed indifferently to those who do Evil and those who do Good? *If he makes his Sun to rise upon the Righteous and upon the Wicked, and his Rain to fall upon the Lands of the Just and the Unjust*, it is, with Regard to the latter, an Effect of his Goodness, which waits their Repentance; and of his Wisdom, which does not permit him to suspend every Day, by sensible Miracles, the Laws it has established in Nature.

out Restriction, that it is lawful to lye to an Enemy: Thus ^a *Plato* and ^b *Xenophon* among the *Greeks*, ¹ *Philo* among the *Jews*, and St. *Chrysostom* among ² the *Christians*, to the Rule given against Lying, add this Exception, Unless we have to do with an Enemy. Hither we may perhaps refer that Message sent by the Men of *Jabesh Gilead* to the *Ammonites*, by whom they were besieged, 1 *Sam.* xi. 10. And that of ³ *Elisha* <535> the Prophet, 2 *Kings* vi. 19. as also that of *Valerius* ⁴ *Laevinus*, who boasted that he killed *Pyrrhus*.

speaking false to deceive an Enemy, by whom asserted.

^a *De Rep.* l. 2.

^b *Memor. Socrat.* l. 4. c. 2. § 16. *Ed. Oxon. & de Cyr. Inst.* l. 2.

XVII. (1) Our Author quotes in the Margin, the Book intituled *De migratione Abraham*, in which I find nothing that is to the Purpose. But there is something upon this Subject in a Passage which I have already referred to, § 14. *Note* 10. *De Cherubim*, p. 110. D. *Edit. Paris.*

2. That Father says, that if we examine the Actions of the most celebrated Captains in all Ages, we shall find that most of their Victories were the Effect of some Fraud; and that such as have obtained Advantages in that Manner, are more praised than those who have performed Exploits by open Force. *De sacerdot.* Lib. I. GROTIUS.

3. The same Prophet gives us another Example, in the second Book of *Kings*, Chap. VIII. ver. 10. according to the Correction of the *Massorethes*, followed by the vulgar Translation; for *Elisha* says thus to *Hazael*, *Go, say to him* [King Benhadad] *thou mayest certainly recover: Howbeit, the LORD hath shewed me that he shall surely die.* GROTIUS.

Elisha, as has been observed, speaks of the Disease which the King of *Syria* actually had, and of which, in Truth, he did not die. This was a very true Answer to the Question that Prince had sent to ask him. But at the same Time the Prophet foretold that he should die in another Manner, as the Event verified.

4. Our Author cites Nobody here: But he has undoubtedly taken this from FRON-TINUS, who does not say, however, that *Valerius Laevinus* boasted of having killed *Pyrrhus*; but only, that a Soldier of *Pyrrhus*'s Army having been killed, *Valerius Laevinus*, shewing the Sword all bloody with which he had been slain, made both Armies believe that it was the King. *Valerius Laevinus adversus Pyrrhum Epirotarum regem, occiso quodam gregali, tenens gladium cruentum, exercitui utriusque persuasit, Pyrrhum intererunt.* *Stratagemat. Lib. II. Cap. IV. Num. 9.* This happened, as we may see in PLUTARCH, from *Pyrrhus*'s having caused *Megacles*, one of his Men, to put on his Armour and Habit; he was killed by a *Roman*, who believed him to be the King. *Vit. Pyrrh.* p. 393. E. F. So that here was no Lye, as our Author imagined, upon FRON-TINUS's Authority. *Quamobrem hostes, destitutos se ducis morte credentes, consternati a mendacio, se pavidi in castra receperunt.* The Example of *Jugurtha* might have been alledged with more Propriety, which follows, *Num. 10.* who boasted falsely, that he had killed *Marius*. See SALLUST, *Bell. Jugurth. Cap. Cl. (CVII Edit. Wass.)*

2. To the *third*, *fourth*, and *fifth* of the Observations above-mentioned, we may refer that of *Eustratius* Archbishop of *Nice*,⁵ Ὁ εὖ βουλευόμενος οὐκ ἐξ ἀνάγκης ὁ ἀληθεύων ἐστίν· ἐστὶ γὰρ πότε τὸν ὀρθῶς, βουλευόμενον καὶ περὶ αὐτοῦ τοῦ ψεύδους βουλευσασθαι, ἢ ἐπιτηδὲς ψεύδεται πρὸς τινα ἢ ἐχθρὸν ὄντα, ἢ σφάλῃ αὐτὸν, ἢ φίλον ἢ ἐκκόψῃ αὐτὸν ἀπὸ κακοῦ, καὶ τούτων τὰ παραδείγματα ἐν ταῖς ἱστορίαις πολλὰ. *There is not always a Necessity that a good Counsellor should speak Truth; for possibly a good Councillor may consult how he may designedly tell a Lye, whereby either to deceive his Enemy, or save his Friend from Harm. Examples of these Kinds are common in all Histories.* And *Quintilian*⁶ says, that a Lye, otherwise blameable, even in a Slave, will deserve Commendation, when a wise Man makes Use of it to hinder one from being murdered by Highwaymen, or to save his country by deceiving an Enemy.

^c *Thom.*
Summ. Theol.
ii. 2. qu. 110.
art. 1. & 3.
Covarr. in
cap. *Quamvis*,
de pactis, in vi.
part. 1. § 1.
n. 15. *Soto* de
Justit. 5. qu. 6.
art. 2. *Tolet.*
l. 4. c. 21. &
l. 5. c. 58. *Less.*
l. 2. de Justit.
c. 42. Dub. 9.

3. I know the Schoolmen of some Ages past will not allow of this,^c who out of all the primitive Fathers have generally chose⁷ *St. Austin* for their Guide in almost every Thing; yet, tho' they are scrupulous of admitting false Speaking in any Case, they allow of tacit Interpretations, so contrary to all Use, that it is doubtful whether it be not better to admit of false Speaking to some Persons, in the fore-mentioned Cases, or some of them (for I do not here pretend to determine any Thing) than so generally to distinguish them from Falshood, as when they say *I know not*, they mean, *I know not how to tell you so*. Or, *I have nothing*, they mean, *I have nothing to give you*. And many such like mental Reservations, which even common Sense is ashamed of; and which, if allowed, will introduce plain Contrarities; so that he that affirms any Thing, may be said to deny it, and he that denies a Thing, may be said to affirm it.

4. For it is certain, that there is no Word⁸ but may admit of a double Interpretation, because every Word, besides the primitive⁹ Signification,

5. In *Ethic. ad Nicomach.* Lib. VI. Cap. IX.

6. The Passage has already been cited, upon *Paragraph 9. Note 14.*

7. The Abbe RUPERT has writ against the Opinion of that Father, who had himself been formerly of another. GROTIUS.

8. This the Philosopher *Chrysippus* maintained, according to AULUS GELLIUS; *Chrysippus ait, omne verbum ambiguum natura esse, quoniam ex eodem duo vel plura*

¹⁰ has also a derivative one, and that divers, ^d according to the Diversity of Arts, and also others by Metaphor, or some such Figure. Neither do I like their Device better, who, as if <536> they quarrelled more with the Word than the Thing, call that Jest which they speak with a Countenance and Pronunciation very serious.

^d See above, § 10. and l. 2. c. 16. § 9.

XVIII. But we must observe, that what we have here said concerning false Speaking, is to be referred to assertory (or affirming) Speech, (and that too so far only as to hurt Nobody, but a publick Enemy) ¹ but not to promissory. For every Promise, as I said before, confers a new and special Right to the Person promised: And this is in Force, even among Enemies, notwithstanding their open Hostility, and that not only in express Promises, but also in tacit ones, as when an Interview is demanded, of which we shall treat more hereafter, when we come to speak of publick Faith to be preserved amongst Enemies.

XVIII. *This is not to be extended to Words promissory.*

XIX. Neither is it to be extended to Oaths, either assertory or promissory, for Oaths have a Power to exclude ¹ all Exceptions which may arise from

XIX. *Nor to Oaths.*

accipi possunt. Noct. Attic. *Lib.* XI. *Cap.* XII. SENECA says there are a great many Things that have no peculiar Names, and which we are obliged to express by borrowed Names. *Ingens copia est rerum sine nomine, &c.* De. Benefic. *Lib.* II. *Cap.* XXXIV. GROTIUS.

9. *Primae notionis.* This is what CICERO calls *Domicilium proprium*; and derived Significations, *Secundae notionis*, he terms *Migrations in alienum*; according to the learned GRONOVIVS's Remark, *Unde illud tam ἄκρπον, valetudini fideliter inseriendo? Unde in istum locum fideliter venit? Cui verbo Domicilium est proprium in officio, migrationes in alienum multae. Nam & doctrina, & domus, & ars, & ager fidelis dici potest, &c.* *Lib.* XVI. *Ad familiar. Epist.*

10. St. AUSTIN, De mag. *That we have found out no Sign, which among the other Things that it denotes, does not also signify itself.* Nullum nos signum, &c. De Magistro. *Cap.* VII. GROTIUS.

XVIII. (1) *Agesilaus*, in PLUTARCH, distinguishes thus, *To break Leagues is to despise the Gods; but otherwise to deceive an Enemy, is not only just but glorious, and a Pleasure with Profit.* GROTIUS.

The Original of this Passage has been given above, § 6. *Note* 8. All the Difference is, that here our Author quotes it, as it is in the Life of *Agesilaus*, where the Terms are a little different, but the Sense exactly the same.

XIX. (1) See what is said upon *B.* II. *Chap.* XIII. § 14. & seq.

the Party we deal with, because therein we treat not only with Men, but with GOD, to whom we stand obliged by our Oaths, tho' there should arise no Right at all to Man: And, as I have said already, it is not so in other Speeches, as in Oaths, for in others it is enough to clear us of a Lye, if the Words be true in any Sense, not altogether unusual; but in Things sworn ² it is necessary that our Words be true in that Sense, in which we sincerely believe those to whom we swear, understand them; so that we perfectly abhor ³ their Impiety, who scruple not to affirm, that it is as lawful to deceive Men with Oaths, as Children with Toys.

XX. *It is more generous, and more agreeable to Christian Simplicity to abstain from Falshood, even to our Enemies, illustrated.*

XX. I. We know there are some Kinds of Fraud, which, tho' naturally permitted, yet are rejected by some Nations and Persons, not so much on the Account of any Injustice in them, as out of either a Greatness of Spirit, or sometimes a Confidence of our own Strength. There is in ¹ *Aelian* a remarkable Saying of *Pythagoras*, that *Man comes near to GOD in two Things, in always speaking Truth, and in doing Good to all Men.* And in *Jamblicus*, ² *Truth is the Guide to all Good, both divine and human.* And in *Aristotle*, ³ *Ὁ μεγαλόψυχος παρρησιαστικὸς, καὶ ἀληθευτικὸς*, A Man of a great Soul delivers himself with Freedom and Truth. And in ⁴ *Plutarch*, *Τὸ ψεύδῃσθαι δουλοπρεπὲς, It is base and servile to lye.* And ⁵ *Arrianus* of King *Ptolemej*, *καὶ αὐτῷ βασιλεῖ ὄντι αἰσχρότερον ἢ τῷ*

2. This is not peculiar to an Oath; but we ought to express ourselves in that Manner as often as those we speak to have a Right to require a faithful Discovery of our Thoughts; in a Word, as often as Lying cannot be innocent. See what I have said upon *Note 2.* of § 10. of this Chapter. So that Swearing would then only make the Lye more criminal.

3. *Δεῖ τοὺς παῖδας*, &c. Some ascribe this Saying to *Lysander*, some to *Philip of Macedon*, and others to *Dionysius* the Tyrant. See *AELIAN, Var. Hist. Lib. VII. Cap. XII.* and the Commentators upon that Place.

XX. (1) *Var. Hist. Lib. XII. Cap. LIX.*

2. *Protrept. Cap. XX.*

3. *Ethic. Nicomach. Lib. IV. Cap. VIII.*

4. *De educatione liberor. p. 11. C. Vol. II. Edit. Wech.* See *PHILO the Jew, Lib. Quod omnis probus est liber, (p. 888. B. Edit. Paris.)*

5. For which Reason he considers *PTOLEMY* as an Historian most to be relied on, with Regard to the Actions of *Alexander the Great.* *De Expedit. Alexand. Lib. I. (init.)*

ἀλλω ψεύσασθαι ἦν, *It is much worse in a King to lye, than in another.* ⁶ So the same Author, of *Alexander*, Οὐ χρῆναι τὸν βασιλέα ἄλλο τι ἢ ἀληθεύειν, πρὸς τοὺς ὑπηκόους, *A Prince should speak nothing to his Subjects but Truth.* And ⁷ *Mamertine* speaks of *Julian*. *Admirable is the Agreement between our Prince's Tongue and his Heart; he is sensible that Lying argues a base and mean Spirit, and is a servile Vice; and whereas Fear or Want makes Men Lyars, that Prince is ignorant of his own Majesty that lyes.* *Plutarch* ⁸ records of *Aristides*, Φύσις ἰδρυμένη ἐν ἡθει βεβαίω καὶ πρὸς τὸ δίκαιον ἀτενῆς, ψεύδος δ' οὐδ' ἐν παιδιᾷς τιμι τρόπῳ προσιεμένη, *He was naturally so great an Admirer of Truth, that he would not allow of a Lye in Jest.* And *Probus* of *Epaminondas*, ⁹ *So great a Lover of Truth, that he would not tell a Lye, tho' but <537> for Sport.* Which ought the more religiously to be observed by ¹⁰ Christians, who are not only commanded to use Simplicity, *Matt. x. 16.* but are also forbidden idle ¹¹ Talk, *Matt. xii. 36.* having him for an Example in whose Mouth was found no Guile. Wherefore, as ¹² *Lactantius* said, *he that is truly honest and just will not say with Lucilius, Homini amico ac familiari non est mentiri meum, It is not my Custom to tell a Lye to my Friend; but also will think it his Duty not to lye to a Stranger, or an Enemy; nor will his Tongue ever speak what his Heart does not think.* Such a one was *Neoptolemus*, says *Sophocles*, ¹³ ὑπερβάλλων

6. *Lib. VII. (Cap. V.)*

7. *Mira est in principe nostro [Juliano], &c. Panegy. Julian. (Cap. XXVI. Num. 3. Edit. Cellar.)*

8. *PLUTARCH, Vit. Aristid. Vol. I. p. 319. D. Edit. Wech.*

9. *Adeo veritatis diligens, &c. CORNELIUS NEPOS, Vit. Epaminond. Cap. III. Num. I. Edit. Cellar.*

10. Christianity, rightly understood, prescribes nothing upon this Head more than the Law of Nature. It is not probable that our Saviour intended, for Instance, to render the Condition of *Christian Nations* more unhappy than that of *Pagan States*, by prohibiting them to use the Stratagems of War; by the Means of which great Advantages may be obtained, and great Dangers avoided.

11. The Term in the Original signifies more than *Idle and useless Talk*; it imports inconsiderate or malicious Words, which produce some bad Effect. See *HAMMOND* and *LE CLERC* upon this Passage.

12. *Itaque viator ille verus ac justus, &c. Instit. Divin. Lib. VI. Cap. XVIII. Num. 6. Edit. Cellar.*

13. *Philoctet. (ver. 85. & seq.)*

ἀπλότητι, καὶ εὐγενείᾳ, *Excelling for his generous Candor*: As *Dion Prusaensis* rightly observed, who being urged by *Ulysses* to use Treachery, replied,

*I grieve to hear your secret Treacheries,
But should do more to act as you advise.*
¹⁴ *If I (Ulysses) were not nobly born,
I yet should base unmanly Actions scorn:
But it would ever shame Achilles Son,
To steal by Craft what should by Force be won.*

And *Euripides*,¹⁵

*A gallant Soul will gallant Actions do,
And scorns by Treachery to kill his Foe.*

3. Thus¹⁶ *Alexander* said he would not steal a Victory; and *Polybius*¹⁷ writes, that the *Achaeans* hated to use Fraud against an Enemy, esteeming that the surest Victory, which, to use *Claudian's* Words,

¹⁸ *Confessus animo quoque subjugat Hostes.*
A Victory confess'd by Enemies is true.

14. What *Neoptolemus* says of his Father *Achilles*, is confirmed by *HORACE*,

*Ille non inclusus equo, Minervae,
Sacra mentito, &c.*
Lib. IV. Od. VI. (ver. 13. & seq.)

*Not he in great Minerva's Horse
Had cheated Troy, and Priam's heedless Court,
Dissolv'd in Wine and Sport;
But hot, and deaf to all Remorse,
Had fiercely storm'd our Walls with open Force.*

CREECH.

Upon which the Scholiast remarks, that the Aversion of *Achilles* to the Stratagems of War, arose from the Confidence he had in his own Valour and Strength. *Achillem nihil fraude, sed semper palam, virtutis fiducia, dimicasse.*

¹⁵ *Rhes.* ver. 510, 511.

¹⁶ *PLUTARCH, Vit. Alex.* p. 683. D. Vol. I. *Edit. Wechel.* See *QUINTIUS CURTIUS, Lib. IV. Cap. XIII. Num. 9.* and the Commentators there.

¹⁷ *POLYBIUS, Lib. XIII. (Cap. I.)*

¹⁸ *In VI. Consul. Honor.* ver. 248, 249.

So were the *Romans* till the second *Punick* War; so that ¹⁹ *Aelian* said, ἴσασι Ῥωμαῖοι ἀγαθοὶ εἶναι καὶ οὐ μὲν διὰ τέχνης καὶ ἐπιβουλῆς καταγωνίσασθαι τοὺς ἐχθροὺς, *The Romans are truly valiant, overcoming their Enemies, not by Craft and Subtilty, but by plain Force.* And when *Perseus* the *Macedonian* King was deceived by the Hopes of Peace, ²⁰ the old Senators disallowed the Act, as inconsistent with *Roman* Bravery, saying, that their Ancestors prosecuted their Wars by Valour, not Craft, not like the subtil *Carthaginians*, nor cunning *Grecians*, among whom it was greater Glory to overcome their Enemies by Treachery, than by true Valour. To which they added, *That sometimes Cunning might for a little While prevail against Valour, but his Courage was for ever lost, who was convinced that in a regular and <538> just War, he was neither by Fraud, nor by Chance, but engaging closely in Battle, with his whole Strength, fairly vanquished.* So in later Times we read in *Tacitus*, ²¹ *That the Roman People avenged themselves on their Enemies, not by Craft or Cunning, but openly, and by Force of Arms.* Such also were the ²² *Tibarenes* (a People of *Cappadocia*) who always proclaimed the Time and Place of Battle. The like does *Mardonius* in *Herodotus* ²³ testify of the *Grecians* in his Time.

XXI. As to the Manner of prosecuting a War, this Rule is also necessary, ¹ that whatsoever is unlawful for a Man to do, is also unlawful for another

XXI. *That it is not lawful for*

19. *Var. Hist. Lib. XII. Cap. XXXIII.*

20. *Haec, ut summa ratione acta, &c. Livy, Lib. XLII. Cap. XLVII. Num. 4, 8.*

21. *Reperio apud Scriptores, &c. Annal. Lib. II. (Cap. LXXXVIII. Num. I.) AELIAN* says the same.

22. This we learn from the antient Scholiast upon APOLLONIUS, in *Argonautic. Lib. II. &c. in ver. III2.*

23. This last Example is not very clear. All that *Mardonius* says in his Speech, to persuade *Xerxes* to make War upon the *Greeks*, is, "The *Greeks*, as I am informed, generally make War in a very rash Manner, on Account of their Ignorance, and Want of Ingenuity: For after having declared War against each other, if they find a fine level Country, they go thither, in Order to fight." HERODOTUS, *Lib. VII. Cap. IX.* Our Author might have here applied the Passage of LIVY, *Note 20.* with more Propriety than this.

XXI. (1) So MAIMONIDES teaches, חֻבֵּל הַלּוֹכֶה, *Chap. V. Sect. X. GROTIUS.*

*us to force
another to do
what is lawful
for us to do,
but not for
him.*

to force or persuade him to. As for Example, ² it is unlawful for a Subject to kill his Prince, or to deliver up a Town without the Consent of a Council of War, or to plunder his Countrymen. Therefore it is also unlawful to persuade him, who continues a Subject, to do so; for he that causes another to sin, always sins himself; neither is it enough to say, that it is lawful for him who tempts another to a base Act to do it himself, as to kill an Enemy, suppose; he may kill him, it is true, but not in such a Manner. And St. *Augustine* ³ says true, *It signifies nothing, whether a Man commit a Crime himself, or employ another to do it for him.*

XXII. *Yet we
may use his
Service that
freely offers it.*

XXII. But it is another Thing if a Person shall freely offer himself, without any Persuasion to it; for it is not unlawful for us then to make use of him, as an Instrument, to do that which it is lawful for us to do. As we have proved already, ^a by the Example of GOD himself. *We receive a Deserter by the Law of War*, said *Celsus*, ¹ that is, it is not contrary ² to the Law of War, to receive him, who quitting the Enemy's Party, embraces ours.

^a B. ii. ch. 26.
§ 5.

2. See upon this PUFENDORF, *B. VIII. Chap. VI. § 16.* and what will be said below, *Chap. IV.* of this Book, § 18.

3. *Nil interest, utrum ipse scelus admittas, an alium propter te admittere velis.* This is in his Treatise *De moribus Manichaeorum*, where the last Words are conceived in this Manner, *An propter te ab alio admitti velis.* But our Author quotes after ALBERICUS GENTILIS, who gives the Passage in those Words, *De Jure Belli*, Lib. II. Cap. IX.

XXII. (1) *Transfugam jure belli recipimus.* Digest, *Lib. XLI. Tit. I. De adquir. rerum Domin.* Leg. LI. See upon this Law, CUJAS, *Observ.* Lib. IV. Cap. IX. and PETER DU FAURE, *Semest.* Lib. II. Cap. III. p. m. 13.

2. Neither are we to deliver them up, unless it be so stipulated by the Articles of Peace, as in the Peace with *Philip*, the *Aetolians*, and *Antiochus*, POLYBIUS, *In Excerpt. Legat.* IX. XXVIII. XXXV. MENANDER, *Protect.* is of the same Opinion. GROTIUS.

How Subjects Goods, by the Law of Nations, are obliged for their Prince's Debts: And of Reprisals.

I. 1. Let us now come to those Rights ¹ which the Law of Nations allows us, which partly belong to every War, partly to some particular Kinds of War only. Let us begin with the first. By the bare Law of Nature no Man is bound by the Fact of another, but he that inherits his Goods. ² For when Pro-^{<539>}perty was first introduced, it was then agreed on, that all Debts should pass together with the Goods to the next Possessor. The Emperor *Zeno* used to say, ³ that it was contrary to natural Equity, that one Man should be troubled for another Man's Debt. Hence arise those Titles in the *Roman Laws*, ^a that a Wife shall not be sued for the Husband; nor the Husband for the Wife; the Son for the Father; nor the Father or Mother for the Son.

1. Naturally no Man is bound by the Fact of another but the Heir.

^a *Cod. l. 4. tit. 12. and tit. 13.*

2. Neither (as *Ulpian* ⁴ says expressly) shall particular Persons be obliged for the Debts of the Community, that is, if the publick Stock

I. (1) See the Beginning of *Chap. I.*

2. It is determined in the *Decretals*, that the Heirs of an Incendiary or Usurer, shall make good the Wrong he has done, or Damage caused, out of his Goods. *Et Haeredes ejus moneas, & compellas, &c.* Lib. V. Tit. XVII. *De raptoribus, incendiariis, &c.* Cap. V. *Quod Filii ad restituendas usurias, &c.* Tit. XIX. *De usuris*, Cap. IX. See what we have said above, *B. II. Chap. XXI. § 19.*

3. *Grave est non solum legibus, &c.* Code. Lib. XI. Tit. LVI. *Ut nullus e vicaneis pro alienis vicaneorum debitis teneatur.* Leg. unic.

4. *Si quid universitati debetur, &c.* Digest. Lib. III. Tit. IV. *Quod cujuscumque universitatis nomine, vel contra eam agatur,* Leg. VII. § 1.

be able to discharge them; otherwise they shall be, not as particular Persons, but as they are part of the Whole. ⁵ *Seneca* says, *If any Man lend Money to my Country, I shall not own myself his Debtor, nor take it as my own Debt, ^b but shall willingly pay my Proportion to discharge the Debt.* He had said before, *As one of the People, not as for myself, I shall pay, but advance it for my Country.* So again, *Every particular Person owes, not as his own Debt, but as part of the Publick.* Hence it was particularly provided by the *Roman Laws*, that no ⁶ Peasant should be obliged for the Debts of another Peasant; and in another Place, that ⁷ no one's Possession should be distrained for the Debts of another, nor even for the Publick; and in *Justinian's Novels*, *ἐνεχυριασμοὶ*, *Reprisals*, ⁸ are expressly forbid; giving this Reason for it, because it is not just that one Man should be the Debtor, and another be forced to pay the Debt; where also such Exactions are called odious. And *Theodorick*, ⁹ in *Cassiodore*, called it a base License, for one Man to be kept as a Pledge for another.

^b See the Sicilian Laws, l. 1. in fin.

II. *But by the Law of Nations, the Goods and Persons of Subjects are obliged for their Prince's Debts.*

II. 1. Tho' this be true, yet by the ¹ voluntary Law of Nations, it may be, and as appears has been introduced, that whatsoever Debts any State, or the Prince, shall <540> contract, either primarily by themselves, or be engaged for by not restoring to others what is their Right; all the

5. *Si quis patriae meae pecuniam, &c.* De Benefic. Lib. VI. Cap. XX. *Deinde ego quoque illi, &c.* Cap. XIX. *Debebunt autem singuli, &c.* Ibid.

6. The Law has been cited a little above, Note 3. See CUJAS upon it.

7. *Nullam possessionem alterius, &c.* Cod. Lib. XII. Tit. LXI. *De Executoribus & Exactoribus*, Leg. IV.

8. *Inhonestas pignorationes, &c.* Novell. LII. Princ. & Cap. I. What the Emperor here calls *Pignorationes*, is the Translation of the Greek Word *Ἐνεχυριασμός*, and in barbarous *Latin* it is expressed by the Word *Repressaliae*, which has been received in the vulgar Tongues; as appears by the *Decretals*, *Et si pignorationes, quas vulgaris elocutio Repressalias nominat, &c.* In VI. Lib. V. Tit. VIII. *De injuriis, &c.* Cap. unic. Where it is better to read with some Manuscripts, *Repressalias*; for that Word answers exactly to the Saxon *Withernam*. But Use has carried it for *Repressaliae*. GROTIUS.

See lower, § 4.

9. *Foedum est, inter jura publica, &c.* Var. IV. 10.

II. (1) This is not an arbitrary or voluntary Establishment, founded upon any pretended Right of Nations, of which the Existence cannot be proved, and where all is reduced to a Custom more or less extended, but which, in itself, has never the Force of a Law. The Right in Question is a necessary Consequence of the Consti-

Goods, both corporal² and incorporeal, of their Subjects, shall be obliged to discharge. But this was occasioned by a Kind of Necessity, otherwise there would be such a Loose given, as to let in all Manner of Injuries,

tution of Civil Societies, and an Application of the Maxims of the Law of Nature to that Constitution. In the Independence of the State of Nature, and before there was any Kind of Civil Government, one could come upon those only who had done the Wrong, or upon their Accomplices; because there was then no Tie between Men, by Virtue of which a Man might be deemed to have consented, in some Manner, to what others did, even without his Participation. But after Civil Societies were formed, that is to say, Bodies, of which all the Members were united together, for their common Defence; there resulted from thence a Community of Interests and Wills; whereby, as the Society, or the Powers which govern it, engage to defend each against the Injuries of every other, whether Citizen or Stranger; so every Individual may be deemed to be engaged to answer for what the Society, or Powers which govern it, do, or owe. No human Establishment, no Tie into which Men enter, can dispense with the Obligation of that general and inviolable Law of Nature, *That Damage or Wrong ought to be made good*; unless those, who are thereby exposed to suffer Wrong or Damage, have manifestly renounced their Right to demand that Reparation. And when such Kind of Establishments prevents, in certain Respects, the injured from obtaining so easily the Satisfaction due to them, that Difficulty should be made up, by supplying the Persons interested with all other possible Means of doing themselves Justice. Now it is certain, that the Society, or the Powers which govern it, by being armed with the Force of the whole Body, are encouraged to baffle, and may often with Impunity baffle, Strangers, who come to demand something due to them: And every Subject contributes some Way or other to enable them to act in this Manner, so that he may thereby be deemed to consent to it. But if he does not actually consent; there is, after all, no other Means to facilitate, to injured Strangers, the Prosecution of their Rights, become difficult from the united Force of the whole Body, than to authorize them to come upon all those who are Members of it, whether they have or have not consented. Besides, how can Strangers know who those are that actually have or have not given their Consent? If they must wait to be fully informed on that Head, they might, generally speaking, as well continue quiet, and patiently suffer the Injury done them: So that, from a necessary Consequence of the Constitution of Civil Societies, every Subject, whilst he continues such, is answerable, with Regard to Strangers, for what the Society, or the Powers that govern it, do or owe; he may, however, demand to be indemnified, when there is any Fault or Injustice on the Part of his Superiors; or when, having been exposed to suffer unjustly for the Body, what it has cost him amounts to more than the Quota he is obliged to contribute for the publick Good. And if he is sometimes disappointed of this Reparation, it must be considered as one of the Inconveniencies which the Constitution of human Affairs renders inevitable in all human Establishments. The Reasons alledged by our Author, serve to strengthen the Principles I have now advanced, which, when considered together, will, in my Opinion, plainly shew that it is not necessary to suppose here a tacit Consent of Nations.

2. See PUFENDORF, *Law of Nature and Nations*, B. IV. Chap. IX. § 7. Note 5. where this Distinction is explained.

for the Goods of Princes cannot so easily be seized upon as those of private Men, who, being many in Number, have each their own. Wherefore *Justinian* ³ reckons it among those Rights which Nations have established amongst themselves, because they judge it useful and necessary to Mankind.

^a *Thom.*
Summ. Theol.
ii. 2. qu. 40.
art. 1. *Molin.*
Disp. 120. &
121. *Valent.*
Disp. 3. qu. 16.
n. 3. *Navarr.*
c. 27. n. 136.

2. Neither is this so disagreeable to Nature, ^a that it might not be brought in by Custom, and the tacit Consent of Nations, since Sureties stand obliged for other Mens Debts, without any other Cause than their own free Consent. It was also believed, and with Reason believed, that Foreigners, for whom little Regard is had in many Places, would not be able so easily to obtain their Right, or find Means to be indemnified, as the Members of the same Civil Society amongst themselves. Besides, the Benefit arising from this Obligation being common to all People, they that find themselves aggrieved by it at one Time, may be relieved by it at another.

3. That this has passed into a Custom, appears not only from ⁴ compleat Wars between Nation and Nation, (for what is practised in such Wars the very Words of the Denunciation declare). ⁵ *Against the antient Latin People, and the Men of old Latium, I denounce and make War*, says the Herald in *Livy*. So when the People's Consent was demanded, ⁶ *Is it your Will and Pleasure that War shall be proclaimed against King Philip, and the Macedonians, and all under his Dominion?* And in the Decree itself, *The Roman People do denounce War against the Hermundulian*

3. *Jus autem gentium, &c.* Institut. Lib. I. Tit. II. *De Jur. Nat. Gent. & Civili.* § 2.

4. The learned NICOLAUS DAMASCENUS distinguishes Wars from these Reprisals, where he shews, that tho' it were not lawful for *Herod* to make War upon the Arabian, he might yet *ρύσια λαμβάνειν*, use Reprisals, for Debts due unto him by Contract. JOSEPHUS, Lib. VI. *Antiq. Hist.* where he has these Words, *Saying that there were five hundred Talents due to Herod, and a Bond given that if the appointed Day of Payment were passed, he might take what he could through all the Country of Arabia, he therefore called this Action, not a warlike Expedition, but a just Execution, to recover his own Due.*
GROTIUS.

5. *Ob eam rem ego, Populusque Romanus, &c.* LIVY, Lib. I. (Cap. XXXII. Num. 13.)

6. *Isque [P. Sulpicius] rogationem, &c.* Idem, Lib. XXXI (Cap. VI. Num. 1.)

People, and the Men of Hermunduli. Which is out of *Cincius*, in his *Res*⁷ *Militaris*. Also, in another Place, *Let him be an Enemy, and all that are*⁸ *under his Protection.* But also from what is practised where no perfect War is absolutely denounced; yet where a certain violent Prosecution of our Right is necessary, which is, as it were, an imperfect War. *Agesilaus* formerly told *Pharnabazus*, a Subject to the King of *Persia*,⁹ *Ἡμεῖς, ὦ φαρνάβαζε, καὶ φίλοι ὄντες πρότερον βασιλέως, ἐχρώμεθα τοῖς ἐχέϊνον πράγμασι φιλικῶς· καὶ νῦν πολέμοι γεγονότες, πολεμικῶς· ἐν οὖν καὶ σε τῶν βασιλέως κτημάτων ὀρώντες εἶναι βουλόμενον, εἰκότως διὰ σοῦ βλάπτομεν ἐκείνον,* *When (O Pharnabazus) we were heretofore Friends to the King, we dealt <541> friendly to all that belonged to him; but now being his Enemies, we shall use them all as Enemies; and therefore, since you resolve to continue one of his, we shall endeavour to hurt him through you.*

III. 1. A Branch of the Execution of this Right is, what the *Athenians* called *Ἀνδροληψίαν*, *Taking of Men Prisoners*: Concerning which the *Attick* Law was this,¹ *Ἐάν τις βιαίῳ θανάτῳ ἀποθανῆ, ὑπὲρ τούτου τοῖς προσήκουσιν εἶναι τὰς ἀνδροληψίας, ἕως ἂν ἡ δίκας τοῦ φόνου ὑποσχωσιν, ἢ τοὺς ἀποκτείναντας ἐκδώσι· τὴν δὲ ἀνδροληψίαν εἶναι μέχρι τριῶν πλέον δὲ μή,* *If any Man was found murdered, the next of Kin had a Right to take any three Men, and no more, and detain them till the Murderer were either punished or delivered up in Order to it.* Hence we may see, that there is a Kind of incorporeal Right of Subjects, (that is, a Liberty to live where they please, and to do what they please) engaged

III. An Example in taking of Men prisoners.

7. *Quodque Populus Romanus cum Populo Hermundulo, &c.* This Passage is part of a Declaration of War which *AULUS GELLIUS* has preserved from a lost Treatise of *CINCIUS*, *De re militari*. Noct. Attic. Lib. XVI. Cap. IV.

8. *Cneus Manlius* being accused of having made War upon the *Gauls*, tho' it had been only decreed by the Senate against *Antiochus*, defended himself with this Reason; that the *Gauls* were amongst the Troops, and in the Fortresses of *Antiochus*, and therefore, that the War ought to be deemed declared also against them. *Atqui cum Antiocho, non cum Gallis bellum, &c.* *LIVY*, Lib. XXXVIII. Cap. XLVIII. Num. 9.

9. *PLUTARCH*, *In vit.* *Agesil.* p. 602. D. F. See also *XENOPHON*, *Hist. Graec.* Lib. IV. (Cap. I. § 15.)

III. (1) *DEMOSTHENES*, *Orat. adversus Aristocrat.* p. 440. C. See the learned *SALMASIUS*, *De modo usurarum*, p. 212. & seq.

for the Debts of every Society, which ought to punish such of their own Body, who shall injure those of another Society; so that the Members thereof may be held in Bondage until the Society do that which it is bound to do, that is, punish the Offenders. For tho' the *Aegyptians* (as we learn out of *Diodore*) did maintain, that it was not just to imprison a Man for Debt, yet there is nothing in it contrary to Nature; and the contrary Practice prevailed, not only amongst the *Greeks*, but also amongst other Nations.

2. *Aristocrates*, who was Contemporary with *Demosthenes*, proposed that a Decree might pass, that whosoever should kill *Charidemus*, might be taken wherever he was met with; and whoever made Resistance should be held as an Enemy. In which *Demosthenes* finds these Faults. First, That ² *Aristocrates* did not distinguish the killing *Charidemus* justly or unjustly, since it was possible to have been justly. Next, That he did not put in this Clause, that in Case *Charidemus* happened to be killed, Judgment should first be demanded against the Murderer, before the Permission of seizing him was made use of. And thirdly, That not they among whom he should be killed, but they that protected the Murderer, should be reputed as Enemies. The Words of *Demosthenes* are these, 'Ο μὲν νόμος, ἂν μήτε δίκας ὑπόσχωσι παρ' οἷς ἂν τὸ πάθος γένηται, μήτε τοὺς δεδρακότας ἐκδίδωσι, κελεύει κατὰ τούτων εἶναι τὸ ἀνδρολήμιον κατὰ τριῶν· ὁ δὲ τούτους μὲν ἀθώους παρήκε, καὶ οὐδὲ λόγον πεποιήται περὶ αὐτῶν οὐδένα, τοὺς δὲ τὸν ἦδ' πεφευγότα, φήσω γὰρ οὕτω, κατὰ τὸν κοινὸν ἀνθρώπων νόμον, ὃς κείται τὸν φεύγοντα δέχεσθαι ὑποδεξαμένους ἐκσπίνδους εἶναι γράφει ἐὰν μὴ τὸν ἰκέτην ἔκδοτον διδώσιν, *If a Murder be committed among any People, and they refuse either to punish, or deliver up the Murderer, the Law allows us to seize on three Men; but he* (*Aristocrates*) *leaves these Men untouched, and does not so much as mention them, but would have those prosecuted as Enemies,*

2. *Orat. advers. Aristocrat.* (p. 440. C.) GROTIUS.

Our Author reads *ἰκέτην* instead of *οἰκέτην*, in the End of this Passage; which Correction I find in the last Edition of WOLFIIUS that I use. But there are some other Places, where he restores the Text, without taking Notice of it, in a Manner which seems to me to be well founded. He might have only added, *θήσω γὰρ οὕτω*, instead of *φήσω γὰρ οὕτω*, as good Manuscripts, and some Editions have it.

who have, according to the common Right of Nations concerning Suppliants, received him that has fled to them for Protection, (for so I put the Case) unless they deliver him up. The fourth Thing that he finds Fault with, is, That *Aristocrates* would immediately bring it to an open and compleat War, whereas the Law only demands the taking up of three Men.

3. Of these four Exceptions, the first, second, and fourth are reasonable, but the third, unless confined to the sole Event of the Murder done, either accidentally, or in Self-Defence, I cannot help thinking, that *Demosthenes* reasons here rather like an Orator, or one that seeks for every Thing that may serve to favour his Cause, than according to Truth and Right; for (as we said ^a before) that Right of Nations to receive and defend Suppliants, does only concern them whom Fortune, not their own Crime, has made miserable.

^a B. ii. ch. 21.
§ 5.

4. Otherwise there is no Difference between those among whom the Crime was committed, and them who refuse either to punish or to deliver up the Offender. And therefore the Law itself, cited by *Demosthenes*, has been thus interpreted <542> either by Custom, or by some express Clause, added afterwards to prevent the like Cavils: No Body will deny the Truth of one of them, who has read that of ³ *Julius Pollux*, ἀνδρολήψιον δὲ ὅταν τις τοὺς ἀνδροφόνους καταφυγόντας ὡς τινὰς ἀπαιτῶν μὴ λαμβάνη ἕξεστιν ἐκ τῶν οὐκ ἐκδιδόντων ἄχρι τῶν τριῶν ἀπαγαγεῖν, *The seizing of Men is then lawful, when a Man having demanded Murderers who have fled to others for Refuge, cannot receive them; for the Right of apprehending three Men, is against those that refuse to deliver up the Delinquent.* And so ⁴ *Harpocration*, Ἀνδροληψία τὸ ἀρπάζειν ἄνδρας ἐκ τινὸς πόλεως· ἐνεχύραζον γὰρ τὴν ἔχουσαν πόλιν τὸν ἀνδροφόνον, καὶ μὴ προἰεμένην αὐτὸν εἰς τιμωρίαν, *The Right of taking Prisoners, is to snatch away some Men from some City: For against such States, who received Malefactors, and refused to deliver them up to Punishment, they antiently used this Right of Reprisal.*

5. The like may be done by any State, whose Subject has been manifestly and injuriously taken away and detained. So at *Carthage* some

3. *Lib. VIII. § 50. Edit. Amstel.*

4. *Voc. Ἀνδροληψία.*

opposed the taking *Ariston* the *Tyrian* Prisoner,⁵ upon this account, *That the like would be done against the Carthaginians, both at Tyre, and in other trading Towns, where their Business called them.*

IV. *And in seizing their Goods.* IV. Another Kind of forcible Execution is *ἐνεχυριασμός*,¹ *Reprisals among divers Nations*, called so by our modern^a Lawyers, which the Saxons and English call² *Withernam*, and the French, where commonly an express Permission must be obtained from the King for that Purpose, *Letters of*³ *Mark*, and is of Force (as⁴ Lawyers say) where Right is denied.

^a Bald. 3. Cons. 58.

5. *Orta deinde Altercatio est, &c.* Liv. Lib. XXXIV. Cap. LXI. Num. 12, 13.

IV. (1) It is also writ *Ἐνεχυρασμός* and *ἐνεχυράζω*. SALMASIUS makes some Difference between these Words, according as the *iota* is retained or left out; *De modo usurarum*, p. 553. & seqq. But see the late Baron SPANHEIM upon the *Clouds* of *Aristophanes*, Ver. 35. Our Author added here in a little Note, that the Right of Reprisals is expressed also by the Greek Word, *Σύλα*: and cites DEMOSTHENES, *Orat. pro Coron.* and ARISTOTLE's *Oeconomic*. Lib. II. The Passage of the latter will be cited in the End of the following Paragraph, *Note* 9. As for the other, the Term in Question is not in it, that I can find. Our Author saw that HARPOCRATION, at the Word *Σύλας*, cites that Orator, *ἐν τῷ περὶ τοῦ στεφάνου τῆς τριηραρχίας*: And the Passage, to which HENRY DE VALOIS refers us, is: *Καὶ μόνοις ὑμῖν οὐδαμῶσε ἔστιν ἄνευ κηρυκείου βαδίσαι διὰ τὰς ὑπὸ τούτων ἀνδροληψίας καὶ σύλας κατεσκευασμένας*, p. 717. B. He has thereupon confounded this little Oration with the famous long one for *Ctesiphon*, *Περὶ τοῦ στεφάνου*, where a different Sort of Crown is spoken of. For the rest, the learned Commentator upon the Greek Lexicographer, whom I have just quoted, alledges several Examples, from good Authors, where *Σύλαι* and *Συλάσθαι* are taken for a kind of Right of Reprizal.

2. From *Wither* or *Wider*, which signifies *again*, and *Nam* or *Namp* that is to say, *taken*. This Etymology alone shews that those are mistaken, who, with Mr. BOHMER (*Introd. ad jus Publicum Universale*, p. 348.) pretend that the Right of Reprisals consists properly, in the refusal of the Sovereign of one Country to do Justice to the Subjects of another Sovereign, who has refused it to his Subjects. This is only a Thing, which has the same Foundation, as what is understood by *Reprisals*, or is sometimes reduced to the same Thing; because, for Instance, it is all one either to take some Effects from foreign Merchants, or to prevent the People of the Country from paying them what they owe them.

3. This Word is derived from the German Word *Marck*, that is to say *Boundaries*; because Reprisals are generally made upon the Frontiers. See the Glossary of DU CANGE, upon the Word *Marcha*.

4. See BARTOLUS, *De Repressaliis*, Quaest. V. § *Ad Tertium*, Num. 9. INNOCENT. and PANOR. in *Can.* VIII. Decretal. *De immunit. Eccles. &c.* DOMINIC. SOTO. *Lib.* III. *Quaest.* IV. *Art.* V. JACOB DE CANIBUS, ANCHAR. DOMINIC. FRANC. in *Can.* I.

V. I. Which may be supposed, not only when Judgment cannot within a reasonable Time be obtained against a Malefactor, or a Debtor, but also when in a Case that will not admit of any Doubt, (for in doubtful Cases the Presumption is in favour of the Judges established by public Authority) Sentence shall pass plainly against Right. For the Authority of the Judge is not of the same Force against Strangers, as Subjects: Nay, even between Subjects, it does not make void a just Debt. For (as *Paulus* ¹ the Lawyer observes) *A real Debtor, tho' he be discharged <543> by the*

V. Which is lawful when our Right is first denied, and when that is, where is also shewed, tho' the Thing be adjudged, yet it neither gives, nor takes away any Man's Right.

De Injuriis, in VI. FULGOSIUS and SALICETUS, in *Authent. Omnino, Col. De Act. & Obligation.* JACOB DE BELLO VISU, in *Authent. Ut non fiant pignorationes.* SYLVEST. Verb. *Repressaliae.* GUIDO PAPA, *Quaest. XXXII.* GAILIUS, *De Pignor.* Observ. I. Num. 5. FRANCISC. VICTORIA, *De Jure Belli,* Num. 41. COVARRUVIAS, in *Cap. Peccatum,* Part II. § 9. Num. 4. GROTIUS.

V. (i) He followed in this the Opinion of JULIAN another Lawyer: JULIANUS, *verum debitorem, post litem contestatam, manente adhuc judicio,* &c. Digest. Lib. XII. Tit. VI. *De condictione indebiti,* Leg. LX. *Princ.* See GAILIUS, *De pace publica,* Lib. II. Cap. VIII. Num. 7 and FERDINAND VASQUEZ, *Controv. Illust.* Lib. IV. Cap. X. § 41. GROTIUS.

MR. COCCEIUS in a Dissertation, *De vero Debitore sententiâ absoluto,* Sect. IV. § 1. & *seqq.* has racked his Wits to explain the Law here cited, so as to elude the Sense our Author finds, in it, and which is what naturally offers itself. The antient Lawyer there decides clearly enough, that if the Person who is actually Debtor, pays during the Course of the Suit, before Judgment given, he cannot afterwards redemand as not due what he has so paid; and he proves it by this Argument, *a major ad minus,* that if the Debtor had paid after final Judgment, he could not even then redemand any Thing, tho' the Cause had been adjudged in his Favour: *Quia nec absolutus, nec condemnatus, repetere posset.* For this cannot be understood, as simply intended to mean, that the Debtor, who has paid before Judgment, cannot redemand any Thing after it; because as soon as he has satisfied the Plaintiff, the Suit is at an End. There is in the same Title a Law of the Civilian PAULUS, the same who recites and approves JULIAN's Opinion in this Case, wherein he says, that if, after Sentence past, the Debtor pays *of his own free Will* (that is to say, without Compulsion but thro' Error, which must always be supposed on this Subject) even tho' he has cast his Adversary, he loses thereby the Right of redemanding his Money: Which is founded upon the Principle established by JULIAN in a general Manner, I mean, that a Debtor continues such by the Law of Nature, whether the Judge condemns or discharges him: *Judex, si male absolvit, & absolutus sua sponte solverit, repetere non potest,* Leg. XXVIII. Our German Lawyer however goes so far as to maintain, that by Virtue of the Authority, which the civil Law gives to the Sentence of the Judge, the natural Obligation of the Debtor, discharged without Reason, is entirely extinguished, so that he may in Conscience dispense with paying his Debt, or redemand what he has paid thro' Ignorance. But

Judge, yet by the Law of Nature still continues a Debtor; and when by an unjust Sentence, a Creditor had taken away something from the right Owner, that had not been the Debtor's, as if engaged to him, the Question being put, whether the Debt being paid, that Thing should be restored to the Debtor, ² Scaevola maintained that it should. Here is the Difference; Subjects are bound up by the Sentence of the Judge, tho' it be unjust, so as they cannot oppose the Execution of it lawfully, nor by Force recover their own Right, for the Efficacy of that Power under which they live: But Strangers have a coercive Power, tho' it be not lawful to use it, whilst they may recover their Right in a judicial Way.

2. Therefore in such a Case, that both ³ the Persons and Moveables of his Subjects, that refuses to render Justice, may be seized, is not indeed

this is a very evident Example of the Extremes into which People run when they are for reconciling, at any Rate, the Decisions of the antient *Civilians*, well or ill understood, with the Principles of natural Equity. The Debtor, in the present Question, either believed himself such before the Sentence, or was not convinced of the Debt, till after he was unjustly discharged. In the first Case, he ought not to have pleaded, and is as culpable in so doing, as the Person, with whom any Thing is deposited, is in denying the Trust. In the other, he is very excusable for having refused to pay what he did not believe he owed; but the Moment he discovered himself to be a Debtor, the Obligation of paying begins to display its whole Force. The Judge's Sentence does not diminish it in the least, and only leaves the Breach of Faith unpunished; supposing the Laws extended so far his Authority. The End, which Legislators propose to themselves, requires no more, as appears from the Principles I have laid down in my *Discourse upon the Permission and Benefit of the Laws*. For the rest, if we examine all Mr. COCCEIUS says, in the Dissertation I speak of, to support his Hypothesis, and reconcile it with the Laws alledged to prove, that a Debtor unjustly discharged continues a Debtor by the Law of Nature, we shall conclude, I believe, that it would be very difficult to understand that modern Lawyer's Meaning, without acknowledging, that the antient Lawyers in this as well as many other Things, were of a different Opinion: A Confession, which it would have been as hard to have extorted from Mr. COCCEIUS, as to have made him own that their Principles were sometimes incoherent, and inconsistent with the Law of Nature. The Reader need only see the extravagant Encomiums he makes upon them in the beginning of that Dissertation.

2. *Et quum, per injuriam judiciiis, &c.* Digest, *De Distraction, Pignor. & Hypothec.* Leg. XII. § 1.

3. There is an Example of this in AMMIANUS MARCELLINUS, where we find that *Julian* the Emperor seized some *Franks*, till their King had restored all the Prisoners, as he had engaged to do by a Treaty of Peace: *Quatuor comites ejus* [Regis Hortarii] *quorum ope & fide, &c.* Lib. XVII. (Cap. XI. p. 189. *Edit. Vales. Gron.*) See LEO AFER,

authorized by Nature, but generally received by Custom. We have a very old Example of this in *Homer's Iliad*, where *Nestor* is said to drive away the Cattle of the *Eleans*, because they had before plundered his Father's Horses, ⁴ *ρύσι' ἐλαυνόμενος*, *taking them by way of Reprisal*; where *ρύσια* is expounded by *Eustathius*; τὰ ἀντὶ τινῶν <544> *ρύσι*, ὃ ἐστὶν ἐλκόμενα καὶ ἀντὶ τῶν προαρπασθέντων ἀρπαζόμενα, *Things taken in lieu of others, that is, seized, and carried away to make amends for others taken from us*. Whereupon, as the Story goes, Proclamation was made, that every Man to whom the *Eleans* owed any Thing, should come, and take of the Spoil proportionably to his Debt, that is to say,

⁵ *Μή τις ἀτεμβόμενος κίλοι ἴσης.*

That no one might go without his just Share.

Another Example we have in the *Roman History*, where *Aristodemus*, *Tarquin's* Heir, seized the *Roman Ships* at *Cumae*, ⁶ for the Goods of

where he speaks of the Mountain *Beni Gualid*, (Lib. III. p. 211. of the old *French Translation*.) GROTIUS.

They were not *Franks*, but *Alamanni*, whom *Julian* seized. Besides, they were kept for Hostages; so that this Example belongs to another Subject.

4. These Horses were seized by *Augeus* King of *Elis*, and were sent by *Nestor's* Father to some Games that were celebrated there:

Καὶ γὰρ τῷ χρεῖος, &c.

Iliad, (Lib. XI. Ver. 697. & seqq.) *Hyperochus* reigned at that Time in *Elis*: *Nestor* killed his Son *Hymoneus*, who opposed his taking away the Herds of Oxen:

——— *Ὅτ' ἐγὼ κτάνον Ἴτυμονήα, &c.*

Ibid. (Ver. 761. & seqq.) POLYBIUS uses the Word *Ῥύσια* in the same Sense as EUSTATHIUS, speaking of the *Achaean*s, who used Reprisals against the *Boeotian*s, with *Philopoemen's* Permission, *Excerpt. Legat.* XXXIII. See also *Excerpt.* CXXIII. I find also *Ῥυσιάζειν* used in DIODORUS SICULUS to express, *to make Reprisals*, *Excerpt.* Pieresc. But *Ῥύσια καταγγέλλειν* is an Expression used in War, upon a Subject very like this, as we shall see in the following Chapter, § 7. GROTIUS.

5. *Iliad.* Ver. 704.

6. *Frumentum Cumis quum coemtum esset, &c.* LIV. Lib. II. Cap. XXXIV. Num. 4.

the *Tarquins* detained at *Rome*.⁷ *Dionysius Halicarnassensis* says he took the Servants, Cattle, and Money. And in *Aristotle*⁸ in his second Book of *Oeconomicks*, we find a Decree of the *Carthaginians* to seize foreign Ships, *εἰ τις σὺλαν ἔχει, If any had a Right of Reprisals.*

VI. *This Right reaches not to the Life of him that is taken.*

VI. It has also been believed among some People, that the Lives of innocent Subjects stand engaged on the like account, and that perhaps upon this Presumption, that every Man has an absolute Power over his own Life, and that it may be transferred to the State; which we have said elsewhere,^a is without Foundation, and not consistent with sound Divinity. Yet it may happen, that Subjects may be killed, tho' not designedly, but accidentally;¹ namely, while they attempt by Force to hinder the Execution of this Right. But if such a Thing may be foreseen, we

^b [[sic: ^a]] B. 2.
ch. 15. n. 7.
and ch. 21. § 2.
n. 2.

7. That Historian relates the Fact otherwise. He says, that the *Romans*, who had followed *Tarquin*, and whose Estates had been confiscated at *Rome*, upon seeing *Roman* Embassadors come to *Cumae* to buy Corn, immediately solicited *Aristodemus*, King of *Cumae*, first to put those Embassadors to Death: But not being able to obtain that, they fell in their Demand, and only desired Permission to arrest them by Right of Reprisals, till the *Romans* had restored them their Effects. *Aristodemus* set the Embassadors a Time to plead their Cause before him, and left them at Liberty, upon laying down a Sum of Money by Way of Security for their Appearance. As the Suit were commenced, and Nobody kept them in Custody, they fled. This Account is in *Chap. II. and XII. of the Roman Antiquities*. The Prince upon this caused the Servants, Cattle and Money they had brought for the purchase of Corn, to be seized, *Cap. XII. p. 411. Edit. Oxon. (427. init. Edit. Sylb.)*

8. The Philosopher says, the *Carthaginians* had a great number of Strangers in their pay, whose Arrears they were not able to discharge. In order to pay off their Debts, they thought of this Expedient. They put out a Proclamation, that such Citizens and Inhabitants, as had a Right of Reprisals in regard to any State or Person, and were willing to claim it, should declare it. A great number of People presented themselves upon this Proclamation, and Ships, trading in the *Euxine* Sea under some manifest Pretext, were seized: After which a Time was fixed for judging what was a lawful Prize. By this Means a great Sum of Money was raised, and they were enabled to pay off the Troops, which they disbanded. The State out of its Revenues made Restitution to those who had been seized unjustly. *Oeconomic. Lib. II. p. 503. C.*

VI. (1) See an Example of this in the Passage of *HOMER*, cited in the foregoing Paragraph, *Note 5.*

are obliged by the Law of Charity ² to forbear the Prosecution of our Right, (as we have shewed in another Place) since by that Law we Christians especially should set a greater Value upon the Life of a Man, than upon our Goods, as he has been also shewed ^b elsewhere.

^b *B. 2. ch. 1*
§ 12, 13.

VII. 1. Moreover in this, as in several other Cases, we must take heed, that we distinguish between those Things that are properly due by the Law of Nations, and those that are due by the Civil Law, or by particular Agreements between some People.

VII. *The Distinction herein between the Civil Law, and the Law of Nations.*

2. By the Law of Nations ^a all the Subjects of the Sovereign from whom one has received an Injury, who are such from *a permanent Cause* (i.e. *settled in the Country*) are liable to this Law of Reprisals, whether they be Natives or Foreigners; but not if they be only Travellers, or sojourn there but for a little Time. For these Reprisals are much of the same Nature with Taxes, which are introduced for the paying of publick Debts. Wherefore they are exempted from them, who only for a Time are Subjects to the Law of the Place. Amongst perpetual Subjects, <549 [[page numbers 545–48 are missing]] > the Law of Nations excepts only from Reprisals, the Persons of Ambassadors ¹ and their Baggage, when they are not sent to our Enemies.

^a *Decius, Cons. 352. Bald. in leg. 3. Digest, De Offic. Adessor.*

3. But by the Civil Law of Nations, the Persons of Women and Children use to be privileged, and even the Goods of Scholars and such as

2. But see what I have said upon the Place referred to in the Margin. Certainly, if our Author's Opinion took Place, the Right of Reprisals would be very useless to a Christian, when those, against whom he would use it, knew him to be in that Disposition: For they would not fail to defend themselves, till there should be a Necessity of killing them, if he did not let them go.

VII. (1) But according to our Author himself, the Privileges of Ambassadors take Place only with Relation to the Powers to whom they are sent, and not with Regard to those, thro' whose Dominions they pass: And he requires also, their having been acknowledged and received as Ambassadors. See above, *B. II. Chap. XVIII. § 5.* Wherefore then should they not be liable to Reprisals, on the Part of those, to whom they are not sent; especially as Reprisals suppose certain Dispositions, which approach the State of Hostility?

go to Fairs. By the Law of Nations every Person ² is permitted to use the Right of Reprisals, as at *Athens*, ἐν ἀνδρολεψία, in the seizure of Persons. By the Civil Law of many Nations this Right must first be desired of the Sovereign, in other Places from the Judges: By the Law of Nations ³ the Propriety of Things taken, is immediately acquired to the Value of the Debt and Charges, ⁴ the remainder to be restored: By the Civil Law, the Persons concerned therein use to be cited, and the Goods by publick Authority sold, and delivered to the Creditors. But in these

2. The Law of Nations grants this Right to all those, who cannot obtain Justice from the Sovereign of a Country, without considering whether they are Members of some other civil Society or not. So that for Instance, at the first Institution of civil Societies, when there were still many Individuals, who continued in the Independence of the State of Nature, those Individuals might no doubt use the Right of Reprisals, with Regard to those who were Subjects. Besides, those who being Subjects, use the Right of Reprisals, have not that Right, properly speaking, as Members of a civil Society; because they would have had it independently of that Relation, by Virtue of the Law of Nations, or rather the Law of Nature itself, according to what we have laid down above. Thus far therefore our Author's Opinion may be admitted. But it is true on the other Hand that Reprisals, being a kind of Act of Hostility, and an Introduction to a War; the End of civil Society requires, that private Persons should not make use of this Right, but with the Permission, either express or tacit, of the Sovereign; as the Commentators upon our Author have observed, who does not explain himself sufficiently in this Place. And in the Example, he alledges of this kind of Reprisals, which was practised by the *Athenians*, the Power, which the Relations of the Deceased had to seize three Persons of the State, that protected the Murtherer, was founded, as we find, upon a formal Law.

3. This must be understood in the same manner, as what we have just said in the preceding Note. The Refusal which has been made of restoring what was due, excuses the injured Person from keeping as a Pledge, the Things he has seized by Way of Reprisals and authorises him to appropriate them to himself. See PUFENDORF, *Law of Nature and Nations*, B. V. Chap. XIII. § 10. or last. But in a civil Society, the good of Order, and the fear of Consequences, require that the injured Persons be not Judges, and absolute Masters of the Reparation, which they may make to amount too high; and that we should even wait some Time to know whether Foreigners will not come to themselves, and pay what they owe, with the Charges, Damages and Interest.

4. The *Venetians* followed this Rule of Equity, having taken the *Genoese Ships in Galata*. But they did not in the least diminish any Thing of the Goods in the Ships taken; their Lading was Wheat and Barley, and salt Fish, taken in the Lakes of Capais and Maeotis and the River Tanais; but these they carefully preserved, and when they had received their Debt, they restored them entire. NICEPHOR. GREGOR. *Lib. IX.* GROTIUS.

and the like Cases one may consult the Civilians, and especially *Bartolus*, who has written concerning Reprisals.

4. I shall add this because it helps somewhat to qualify the Severity of this Right, in itself too rigid, *viz.* ^b that they who either by not paying what they owe, or not doing Justice to injured Persons, have occasioned these Reprisals, are bound by the Laws of GOD and Nature, ⁵ to make Satisfaction for those Losses, which others have suffered upon this account.

^b See Aegid. Regius, De Act. Supern. Disp. 13. Dub. 7. n. 117.

5. Thus PLUTARCH (in the Life of *Cimon*) of the *Scyrians*: *Many of them would not contribute Money, but commanded those, who either had then in Possession, or had taken away other Men's Goods, to repair the Loss*, (p. 483. C. Vol. I. Edit. Wech.) GROTIIUS.

Of a just or solemn War, according to the Right of Nations, and of its Denunciation.

I. *That a solemn War by the Right of Nations, is to be between divers People.*

^a B. 1. ch. 3.

I. 1. We have ^a already mentioned, that according to the Opinion of the best Authors, a War is often said to be just, not from the Cause whence it <550> arises, nor, as elsewhere, from the great Actions ¹ done in it, but from some peculiar Effects of Right. But what manner of War this is, is best understood by the Definition which the *Roman* Lawyers give of an Enemy. *Pomponius* says, ² *They are Enemies, who publickly denounce War against us, or we against them; the rest are but Pirates, or Robbers.* So says *Ulpian*, ³ *They are Enemies against whom the People of Rome have publickly declared War, or they against the Romans; the rest are called pilfering Thieves, or Robbers. Wherefore he that is taken by Robbers, is not a Slave to those that take him, neither does he want the Right of Postliminy. But one taken by the Enemy, suppose by the Germans, or Parthians, is the Enemies Slave, and may recover his former Condition by the Right of Post-*

I. (1) *To which the Epithet Just is sometimes applied:* Thus a Fight is said to be *Just* in Opposition to some slight Skirmish: *Qui intentiore cura suos, quasi ad justum praelium, paucis adhortatus, &c.* *QUINT. CURT. Lib. III. Cap. XIII. Num. 8.* See *PITISCUS*, upon this Passage, and *ALBERICUS GENTILIS, De Jure Belli, Lib. I. Cap. II. p. 20, 21.*

2. *HOSTES hi sunt, &c.* *Digest, Lib. L. Tit. XVI. De verborum significatione, Leg. XCVIII.*

3. *Hostes sunt, quibus bellum publice Pop. Romanus, &c.* *Digest. Lib. XLIX. Tit. XV. De Captivis & Postliminio, &c.* *Leg. XXIV.* We find Examples of Persons taken by Robbers in the *Poenulus* of *PLAUTUS* and the *Eunuchus* of *TERENCE*. This was also the Fate of *Eumaeus*, as he relates it himself in the *Odyssey* of *HOMER, Lib. XV. (Ver. 402. & seqq.) GROTIVS.*

liminy. And *Paulus* the Lawyer says, *They that are taken* ⁴ *by Pirates, or Robbers, continue free.* To which we may add that of *Ulpian*, ⁵ *In civil Dissentions, tho' by them the State be often wounded, yet the Ruin of the State is not intended; they that embrace either Party, are not such Enemies as they who have the Right of taking Prisoners, and of Postliminy; therefore they who are taken and sold, and afterwards recover their Liberty, have no Occasion to petition the Prince for their Freedom, having never left it.*

2. This only is to be observed, that under the Example of the People of *Rome*, whosoever has sovereign Power in a State is to be comprehended. *He is an Enemy* ⁶ *(says Cicero) Who has the Government of publick Affairs, a publick Council, a Treasury, the Right of commanding the People by Vertue of their Consent and Union, the Power of making Peace and War, when necessary.*

II. I. Neither does ¹ a State immediately cease to be a State, tho' it commits some Acts of Injustice, even by publick Deliberation; nor is a Company of Pirates and Robbers to be reputed a State, tho' perhaps they may observe some kind of Equity among themselves, ² without which no Body can long subsist. For these latter are ³ associated on the account of their Crimes; but the other, tho' sometimes not wholly guiltless, do associate for the peaceable Enjoyment of their own Rights, and to do Right to Foreigners, if not in all Things according to the Law of Nature, which

II. *A Distinction of a Nation doing unjustly from a Company of Pirates and Robbers.*

4. *A piratis, aut Latronibus, capti, liberi permanent.* Digest. Lib. XLIX. Tit. XV. *De Captivis & Postlim.* &c. Leg. XIX. § 2. *Pompey* declared those who had been taken by the Pirates to be free. *APPIAN.* *Bell. Mithridatic.* (p. 237. Edit. H. Steph.) See *HERRERA*, Vol. II. *GROTIUS*.

5. *In civilibus dissensionibus, &c.* Ibid. Leg. XXI. § 1.

6. He insinuates this in speaking of the antient Wars of the *Romans*, in Opposition to the civil War of *Mark Anthony*: *Ac maioribus quidem vestris, &c.* Orat. *Philip.* IV. Cap. VI.

II. (1) See *PUFENDORF*, Lib. VIII. Chap. VI. § 5. *Of the Law of Nature and Nations.*

2. Consult what our Author says in his preliminary Discourse, § 24.

3. *PROCOPIUS* describes them thus: A Multitude assembled and united not according to the Laws, but by their Crimes. *Vandalic.* Lib. II. (Cap. XV.) *GROTIUS*.

These Words are in the Oration of *BELISARIUS*, upon the Revolt of the *Roman* Soldiers in *Africa*.

^a B. 2. *cb.* 15.
 § 5. *n.* 2 and
cb. 20. § 43.

(as I have elsewhere ^a shewed) among many Nations, is in part forgotten, at least according to the Agreements which they have made, and the Customs that are established. Thus the Commentator upon *Thucydides* observes; ⁴ that whilst the *Greeks* allowed Piracy they abstained from Murders, from robbing in the Night and from stealing plowing Oxen. And *Strabo* ⁵ informs us, that other Nations, tho' they lived by Piracy, upon their return Home, would send to the Owners, that if they would they might redeem their Goods at a moderate Price; to which we may refer that of *Homer Odys.* &c. 14.

⁶ Καὶ μὲν δυσμενέες,

*In search of Prey to foreign Coasts they sail,
 And if successful, then do with full Gale
 Return unto their Country, fearing still
 The Gods, that do regard both Good and Ill.*

4. In *Lib.* I. (§ 5. Edit. Oxon.)

5. *Geograph.* Lib. XI. The Grammarian SAXO relates the same Thing of another People, *Lib.* XIV. (p. 234. where, however, there is nothing that has any Relation to this Subject.) PLUTARCH, speaking of the Inhabitants of the Isle of *Scyros*, says, that formerly they were contented with Piracy, but at Length they had arrived at such a Degree of Wickedness, as to rob the Strangers, who came to traffick with them. *Vit. Cimon.* p. 483. C. Vol. I *Edit. Wech.* GROTIUS.

The People STRABO speaks of are the *Achaeans*, the *Zygiens*, and the *Heniochians*, all inhabitants of one Coast of the *Bosphorus*, which makes a Part of Mount *Caucasus*. The Passage is: Μετὰ δὲ τὴν Σινδικήν, &c. p. 758. A. 759. A. *Edit. Amstel.* JACOBUS THOMASII, who refers us to this Passage in his Dissertation intitled, *Historia de latrocinio gentis in gentem*, § 22. criticises our Author, as if thro' mistake he had understood all the Booty those People made, whereas the Geographer speaks only of the Persons they took. But he is mistaken himself, in having blindly followed the *Latin* Version, which without Reason so determines the Generality of the Sense, apparently from the ἀνδραποδισμού χάριν which goes before. The same Author also without ground confines the Passage in Question to the *Heniochi*, which relates equally to both the other People; as will appear upon examining the Sequel of the Discourse. In another Dissertation, *De moralitate latrocinii gentis in gentem*, § 9. he quotes ARISTOTLE, who ranks the *Heniochi* amongst the Anthropophagi [or Man-eaters] and thereupon seems to question, what STRABO says of them in the Passage here cited. But the one does not hinder the other from being true.

6. *Ver.* 85. & seqq.

2. But in Morals, the principal Part gives form to the Whole: And as Cicero ⁷ well observed in his 5th Book *De Finibus*, *Because it contains the greatest Parts, and spreads furthest, the Whole is named from it;* to which agrees that of Galen, ἀπὸ τοῦ πλεονεκτοῦτος ἐν τῇ κράσει γίνονται αἱ προσηγορίαι, *In Mixtures the Denomination is always taken from that which is the greatest Portion.* The same Author often calls them ὀνομαζόμενα κατ' ἐπικράτησιν, *named from the most powerful.* Wherefore ⁸ Cicero was too loose in his Expression, in saying, when a King is unjust, the Nobles unjust, or the People, it is not properly a corrupt State, but none at all. Which St. Augustine ⁹ thus corrects, *Neither can I therefore say that a People is no People, or the State no State, as long as there remains a Multitude of reasonable Creatures associated for the Defence of the Things that they love.* A sick Body is yet a Body. And a State, however distempered, is still a State, as long as it has Laws and Judgments, and other

7. *Semper enim ex eo quod maximas partes continet, &c.* Cap. XXX.

8. This is in a Fragment of his third Book, *De Republica*, which St. AUSTIN has preserved in his *De Civitat. Dei*, Lib. II. Cap. XXI. I shall give the Whole Passage, because it is fine: *Respublica res est Populi, quum bene ac juste geritur, sive ab uno Rege, sive a paucis Optimatibus, sive ab universo Populo. Quum vero injustus est Rex, quem Tyrannum voco; aut injusti Optimates, quorum consensus Factio est; aut injustus ipse Populus, cui nomen usitatum nullum reperio, nisi ut etiam ipsum Tyrannum adpellem: Non jam vitiosa, sed omnino nulla, Respublica est; quoniam non est res Populi, quum Tyrannus eam, Factiove, capessat: Nec ipse Populus jam Populus est, si sit injustus; quoniam non est multitudo Juris consensu, & utilitatis communione, sociata:* "A State is really a State, that is to say, the Government of the Affairs of the People, when they are administred well, and according to the Rules of Justice, either by a King or the principal Persons of the State, or the Whole Body of the People. But when the King is unjust, which I call a *Tyrant*; or the principal Persons are unjust, and by agreeing together, form a *Faction*; or even the Body of the People are unjust, an Abuse, for which there is no Name that I know of, unless it may be called a Tyranny of the People: This, cannot properly be called a *bad* Government but absolutely *none* at all; since it is a *Tyrant* or *Faction*, that reigns and administers his, or their Affairs, and not those of the People. The People themselves are no more a Body of People, from the Moment they are unjust; because they are no longer a Multitude of People united together by a Community of Rights and Interests." It appears from hence that CICERO speaks of an Abuse of the Supreme Authority, carried so far by those, who have that Authority in their Hands, as to be an entire Subversion of lawful Government; in which Case he might well say, that the State, or Government was destroyed; tho' indeed, with regard to Strangers, it remains still a State, but an ill governed one.

9. *Nec ideo tamen vel ipsum, &c.* De Civit. Dei, Lib. XIX. Cap. XXIV.

Means necessary for Natives, and Strangers, to preserve, or recover their just Rights. ¹⁰ *Dion Chrysostome* is more in the right, who says that the Law (especially that of Nations) is in a State, as the Soul in a human Body, ¹¹ for that being taken away it ceases to be a State. ¹² *Aristides* in his Exhortation to the *Rhodians* unto Peace, shews that many good Laws may be consistent even with <552> Tyranny. And ¹³ *Aristotle* says, that tho' in an Aristocracy, or Democracy, the Nobles or People govern ill, yet that does not immediately destroy the Civil Government, but only renders it vitious. Let us illustrate this by Examples.

3. We have already declared the Opinion of *Ulpian*, ¹⁴ that they who are taken by Robbers do not become their Slaves; but he says, those taken by the *Germans* lost their Freedom. Yet among the *Germans*, whatever Robberies were committed without the Bounds of any State, were not blamed; they are ¹⁵ *Caesar's* own Words. And *Tacitus* tells us, that the *Venedi* ¹⁶ *robbed in the Woods and Mountains between the Peucini and Fenni*. He also observes, that the *Catti*, ¹⁷ a noble People of *Germany*, practised Robberies. And again the *Garamentes*, ¹⁸ a Nation abounding

10. *Orat. Borysthenit. & De Lege.*

11. This *CICERO* says of the Condition in which the publick Affairs were in his Time: *Nec Leges ullae sunt, nec judicia, nec omnino simulacrum aliquod ac vestigium civitatis*, Lib. X. Ad Famil. *Epist.* I. *GROTIUS*.

12. That Orator does not speak of a Sovereign, who reigns tyrannically, but of a Man, who has possessed himself of the Government of a free State; for the *Greeks* gave the Name of Tyrant to such Usurpers, whatever Moderation and Equity they administred the publick Affairs with. *ARISTIDES* to induce the *Rhodians* to Unity and Concord, shews, that it is better for a Republick to lose its Liberty in that manner, than to be torn in pieces by Sedition and Civil Wars, and he alledges this amongst other Reasons, that some Legislators themselves have believed it necessary to make Laws under a Tyrant or an Usurper, whereas Nobody ever imagined, that a Government could ever be formed or subsist during a Sedition. *Orat. De Concordia, ad Rhodios*, Vol. II. p. 385. A. B. *Edit. Paul. Steph.*

13. *Politic.* Lib. V. Cap. IX. p. 401. B. C. Vol. II. *Edit. Paris.*

14. See Paragraph I. of this Chapter, *Note* 3.

15. *Latrocinia nullam habent infamiam, &c.* De Bell. Gall. Lib. VI. Chap. XXIII.

16. *Nam quicquid inter Peucinos, &c. German.* Cap. LXIV. Num. 2.

17. *Iisdem temporibus, &c.* Annal. Lib. XII. Cap. XXVII. Num. 3.

18. *Nam populus Oënsis, &c.* Ibid. Hist. Lib. IV. Cap. L. Num. 6.

in Robbers, and yet a Nation. The *Illyrians*,¹⁹ without Distinction, used to rob by Sea, yet a Triumph was granted to their Conqueror, tho' it was denied to *Pompey*²⁰ over the Pirates. So great a Difference is there between a Nation, however wicked, and those who, not making a Body of People, are confederated only to do Mischief.

III. Yet sometimes there may happen a Change, not only in particular Persons, as in ¹ *Jephtha*, ² *Arsaces*, ³ *Viriatus*, who from Captains of Thieves, became lawful Commanders;⁴ but also in Companies; as when a Company of Robbers leaving their wicked Practices, and following an honest Course of Life, become a civil Society. St. *Augustine* says thus of Robberies, ⁵ *If this Mischief by a great concourse of desperate Men should grow so great, that they should seize on certain Places, settle themselves in them, take Cities, and subdue Nations, it then assumes the Title of a Kingdom.*

III. Yet sometimes there happens a Change.

19. A Triumph was decreed to *Augustus Caesar*, as we learn from APPIANUS ALEXANDRINUS, *Bell. Illyric. p. 1208. Edit. Amstel. (766. Edit. H. Steph.)* and not to *Cneus Fulvius Centumalus*, as GRONOVIVS says here, who confounds the Times and Persons. For that Consul's Expedition was followed by a Peace.

20. He triumphed on their account, but at the same Time he triumphed for having conquered *Mithridates*. See APPIANUS ALEXANDRINUS, *De Bell. Mithridatic. p. 416, 417. Edit. Amstel. (252. Edit. H. Steph.)* PLINY has preserved the Inscription of this Triumph, at the Head of which are these Words: *Quum oram maritimam a praedonibus liberasset, &c.* Hist. Natur. Lib. VII. Cap. XXVI. *Pompey* was not the only Person who had the Honour of a Triumph, for having conquered Pirates. See the Note of the learned GRONOVIVS.

III. (1) It is said in the Book of *Judges*, Chap. XI. Ver. 3. that *Jephtha* went to settle in the Land of *Tob*, and *there were gathered vain Men to Jephtha, and went out with him*. This was against the Enemies of *Israel*, that harassed and pillaged them often. See Mr. LE CLERC's Commentary upon the Place. So that he only rendered like for like.

2. He became a famous King of *Parthia* from being a Captain of Robbers: *Erat eo tempore Arsaces, vir, sicut incertae originis, ita virtutis expertae, &c.* JUSTIN, Lib. XLI. Cap. IV. Num. 6, 7.

3. *Ceterum Lusitanos VIRIATUS erexit, &c.* FLORUS, Lib. II. Cap. XVII. Num. 15.

4. The antient *Mamertines* are an Example of this Kind. See DIODORUS SICULUS, in *Fragment. (Lib. XXI. XXII.)* GROTIUS.

5. *Hoc malum si in tantum, &c.* De Civit. Dei, Lib. IV. Cap. IV.

IV. *It is required in a solemn War, that he that makes it have a Sovereign Power; and how that is to be understood.*

^a *B. 1. ch. 3.*

^b *Cajet. 2. 2 Qu. 40 Art. 1.*

V. *And that it be solemnly denounced.*

IV. We have already ^a shewed who are they that have Sovereign Power, whence we may also gather, that he that hath it but in part, may for that Part make a just War; ^b much more they who are not Subjects, ¹ but unequally Confederates: As between the *Romans* and their Allies, (tho' upon unequal Terms) the *Volscians, Latins, Spaniards* and *Carthaginians*, every Thing that a War in form requires was observed, as we may learn from History.

V. But that War may be called just in the Sense under Consideration, it is not enough that it is made between Sovereigns, but (as we have heard before) it must be undertaken by publick Deliberation, and so ¹ that one of the Parties declare it to the <553> other: Whence *Ennius* calls it published Battles. ² *Cicero* in his first Book of Offices observes, *There is no*

IV. (1) As the Duke of *Lorrain* in CRANTZIES, *Saxon*. XII. 13. The City of *Straelsund* declared War against the Dukes of *Pomerania*, its Princes; the same CRANTZIUS, *Vandal*. XIV. 35. GROTIUS.

V. (1) JOSEPHUS, the *Jewish* Historian, says, that it is unjust to make War without having first declared it. *Antiq. Jud.* Lib. XV. See Examples of Declarations of War, in CRANTZIUS, *Saxonic*. Lib. XI. and in the Life of *Basilides*, Great Duke of *Muscovy*, by ODERBORN, *Lib. III.* NICETAS, *Lib. III.* (*Histor. Manuel. Comnen.* Cap. VI.) blames the Sultan *Chliziastlan*; and elsewhere, *Lib. V.* (*Cap. IV.*) *Neeman*, a Prince of the *Servians*, for having acted in a different manner. GROTIUS.

The *promulgata praelia* is not ENNIUS's but CICERO's, who uses this Expression of his own Head in citing some Words from that antient Poet: *Etenim ut ait ingeniosus Poeta & Auctor valde bonus praeliis promulgatis, Pellitur e Medio non solum ista vestra verbosa simulatio prudentiae, sed etiam ipsa illa domina rerum SAPIENTIA: VI GERITUR RES. Orat. pro Muraena.* Cap. XIV. See AULUS GELLIUS, *Lib. XX.* Cap. IX. where he recites the Verses, from whence this is taken. Our Author fell into this small Mistake from having followed ALBERICUS GENTILIS, *De Jure Belli*, Lib. II. Cap. I. p. 217. In the Passage of JOSEPHUS, it is *Herod* who speaks and gives *Athenion* to understand, that in attacking him by Surprize, and without having declared War, he had committed a second Injustice, *Cap. VIII.* p. 522. D.

2. *Ac belli quidem aequitas, &c.* *De Offic. Lib. I. Cap. XI.* JUSTUM BELLUM est, quod, &c. (*Origin. Lib. XVIII. Cap. I.*) GROTIUS.

I do not find that ISIDORE gives this Definition as from an antient Author: GROTIUS cites the Passage here, as he found it recited in the *Canon Lau*, Caus. XXIII. Quaest. II. Can. I. But according to DENNIS GODEFROY's Edition, which I use, it is: *Justum Bellum est, quod ex praedicto geritur, de rebus repetitis, aut propulsandorum hostium causa.* The Corrector of the *Roman* Edition maintains also, that this is the better reading, as it is confirmed by all the Manuscripts, as well as Editions. The Sense is

lawful War but what is made after redemanding what was due, or after a Declaration in form. The antient Writer quoted by *Isidore* is not so clear, *That War is just which is made in consequence of a Declaration, either for the recovering our own, or for repulsing the Enemy.* *Livy*³ says, a just War is that which is openly made, and by publick Deliberation. And having first declared, that the *Acarmanians* had wasted the *Athenian* Lands,⁴ says, *That was the beginning of Disputes, but that afterwards they came to a War in form, decreed and declared by the States.*

VI. 1. For the better understanding of these and other Passages that treat of the denouncing of War, we must carefully distinguish what Things are due by the Law of Nature, and what are not by the Law of Nature, and yet are honest; and also what Things are required by the Law of Nations to obtain the proper Effects of the Right of Nations; and lastly, what Things do arise from the peculiar Customs of some People.

VI. In denouncing what is required by the Law of Nature, what by the Law of Nations is handled distinctly.

By the Law of Nature, where either Force is repelled by Force, or Punishment demanded of him who is the Offender, there no denouncing of War is required. And this is what *Sthenelaidas* the *Ephorus* pleads in¹ *Thucydides*, οὐ δίκας οὐδὲ λόγοις διακριτέα μὴ λόγῳ καὶ αὐτοῦς

much the same, according to our Author, who understands by *edictum* the same Thing as is meant by *ex praedicto*; which appears, from what he says a little lower, § 7. *Num.* 4. So that the Definition, according to him, is defective, in not expressing the other Condition, or publick Deliberation, which the Declaration however supposes. *ALBERICUS GENTILIS*, *De Jure Belli*, Lib. II. Cap. I. p. 216, 217. pretends that *ex edicto* should be read; founding his Opinion solely upon the Passage in *LIVY*, which will be recited in the following Note.

3. *Bellum palam & ex edicto gerere*, says our Author. He does not direct us to the Passage, where these Words are, tho' he might easily have done it after *ALBERICUS GENTILIS*, (*ubi supra*) from whom he has taken them. It is in the first Book, where the Historian, speaking of the War of the *Fidenates* and *Vejentis* against the *Romans*, says, that *Metius Fuffetius*, Dictator of *Alba*, had secretly encouraged them to undertake it, upon promise to assist them by betraying the *Romans*: *QUIA suae civitati animorum.* &c. Cap. XXVII. *Num.* 2.

4. *Hic exercitus [Acarmanum] primo, &c.* Lib. XXXI. Cap. XIV. *Num.* 10.

VI. (1) *Lib.* I. Cap. LXXXVI. *Edit. Oxon.* The same Author makes the *Plataean* Deputy say, that by the Laws, of all Nations, it was allowable for a People to defend themselves against an Invader, *Lib.* III. Cap. LVI. For this Reason *Flaminius*, as *DIO-DORUS SICULUS* tells us, called the Gods and Men to witness, that he was not the

βλαπτομένους, *There is no disputing with Words and Arguments when we have been injured by them otherwise than in Words.* And *Latinus* observes in *Dionysius Halicarnassensis*, ² τὸν ἄρχοντα πολέμου πᾶς ὁ προπαθὼν ἀμύνεται, *Whoever is attacked defends himself immediately against the Aggressor.* And as ³ *Aeli*-<554>*an* out of *Plato*, ⁴ That War made to beat away an Invader needs no other Herald but Nature itself. Hence *Dion Chrysostome* observes, ⁵ πόλεμοι ὡς τὸ πλείστον ἀκήρυκτοι γίνονται, *Many Wars are made without denouncing.* Neither does ⁶ *Livy* blame *Menippus*, *Antiochus's* General, for any Thing, but that he had killed certain *Romans*, when no War had been denounced, and when they had heard nothing of the drawing of a Sword, or any Bloodshed; thereby implying, that if either of these had been done, it might have justified

Aggressor, but King *Philip*. Excerpt. Peiresc. p. 297. See MARIANA XIX. 13. and DEXIPPUS, in Excerpt. Legat. GROTIUS.

The Passages, quoted in this Note, speak only of the Justice of Defence against an unjust Aggressor; but have nothing in them that relates to Declarations of War.

2. It is where he complains of *Aeneas* and the *Trojans*, for having plundered his Country without any Reason, and without having declared War. *Antiq. Roman.* Lib. I. Cap. LVIII. p. 46. Edit. Oxon. (47. Edit. Syll.)

3. It is in his *Tactics* or Treatise upon the manner of drawing up an Army in order of Battle, a Work believed to be done by an Author more antient than him, whose *Var. Histor.* and *Histor. Animal.* are known to all the World. OBRECHT directs us to the Place of that Work, where this Passage is found, and that of PLATO quoted there. But he should have added, that neither the one nor the other are to the Purpose. AELIAN to prove the Utility of the military Art, says, that all Men ought to provide for War, for the Reason contained in the Passage of PLATO, which, as we shall see in the following Note, signifies something different from what our Author finds in it. The Words of him who cites the antient Philosopher are: Ὅτι μὲν τοι τὸ μάθημα, &c. Cap. I. p. 12. Edit. Arcer. 1618.

4. The *Cretan* Interlocutor says, that even in Time of Peace, it is necessary to think of War; because properly speaking, there is no true Peace; all States, being naturally at War with each other, a War that is not declared by Heralds; that is to say, they either have a secret Enmity, or a Disposition to make implacable War against one another; according to the most common and known Signification of the Epithet, ἀκήρυκτος when joined with the Word War. *De Legib.* Lib. I. p. 626. A. Vol. II. Edit. H. Steph. So that there is nothing in the Passage which tends to establish, that when we act only on the defensive, the Declaration of War is unnecessary.

5. *Orat. ad Nicomed.*

6. *Et nondum aut indicto bello,* &c. Lib. XXXV. Cap. LI. Num. 2, 3.

the Fact. Neither does the Law of Nature require, that the right Owner, ⁷ being to recover his own, should declare War.

2. But as often as one Thing is to be taken for another, or the Goods of a Debtor to be seized for a Debt, a Demand is requisite; much more when the Goods of Subjects are to be seized for the Debt of the Prince, whereby it may appear we have no other way to recover our own, or our Debt (*but by War*). For the Right which we have in those Things is not principal, but secondary, and substituted, as we have declared ^a elsewhere. So a Sovereign ought not to be attacked, either for the Debts or Offences of his Subjects, till Satisfaction has been demanded, the Denial of which puts him in the Wrong, so that he may be deemed to be the Cause of the Damage done to Foreigners, or to render himself culpable towards them, according to what we have ^b treated of before.

But where the Law of Nature does not require such a Demand to be made, ^c yet it may be done honestly ⁸ and commendably, to the End that the Offender may forbear, if he will, to give Offence, or that that already given may be atoned for by Repentance and Satisfaction; ac-

^a *B. 2. ch. 7.*
^{§ 2. B. 3. ch. 1.}
^{§ 2. n. 3. and}
^{ch. 2. § 2.}

^b *B. 2. ch. 21.*
^{§ 2, &c.}

^c *Mariana,*
Hist. Hisp.
 xxvii. 13.

7. Provided we are well assured that he who detains our Right, will not restore it. Mr. CARMICHAEL, Professor at *Glasgow*, adds another Exception, which is, when we cannot retake our own without hurting others, who keep the Thing taken away or detained unjustly, in which Case he is of Opinion, that a conditional Declaration ought to precede. *Not. in PUFENDORF, De Offic. Hom. & Civ. Lib. II. Cap. XVI. § 7.* But if those People know or can easily know, that he, who gave them the Things to keep, possesses it unjustly; they are Accomplices in the Injustice, and therefore deserve to be treated with no greater Tenderness, than the principal Detainer. And if they are actually ignorant, it is the same in this Case, as when after having declared War in form, we commit Hostilities, which we foresee must hurt the innocent, as well as guilty, Subjects of the Enemy. This is a Misfortune to which they are exposed, by an inevitable Consequence of the Constitution of civil Societies: We are not therefore obliged to abandon, or suspend, the pursuit of our Effects or Rights, especially, when a favourable Occasion offers, which we are afraid to miss.

8. It is not only *honest* and *commendable*; we are even obliged to act so by the Law of Nature, as often as we can without Prejudice to ourselves. We do not indeed injure him, properly speaking, who, as far as in him lies, has given us just Cause to take up Arms against him. But the Love of Peace, Humanity, and Compassion for a great Number of innocent Persons, who are always involved in the Calamities of War, undoubtedly require, that all Means should be used to avoid it, and that we should retain as long as possible the Hope of bringing the Aggressors to right Reason.

^d *B. 2. ch. 23.* cording to those Rules which I have ^d already set down, for the pre-
^{§ 7.} venting the Calamities of War; to which we may apply, ⁹

Extrema primo nemo tentavit loco.

No one at first will fly unto Extremes.

^e *Deut. xx. 10.* And the Command which ¹⁰ GOD gave the ^e *Hebrews*, to offer Peace to a City be-^{<555>}fore they fought against it, was peculiarly given to that People; and therefore by some ill confounded with the Law ¹¹ of Nations. Nor was that Peace offered as absolute, but upon Condition of Submission and Tribute. When *Cyrus* had marched into *Armenia*, he forbore Acts of Hostility, till he had sent Embassadors to the King, to demand the Tribute and Troops he owed, by Vertue of a Treaty, *νομίζων φιλικώτερον εἶναι οὕτως ἢ μὴ προειπόντα πορεύεσθαι*, *esteeming it more humane to act thus, than to go on without any Declaration*, as *Xenophon* ¹² speaks in his History of that Action. But by the Law of Nations, a publick Denunciation is required in all ¹³ Cases, as to those peculiar Effects of a just War, if not on both Sides, yet on one.

9. This is a Verse of *SENECA*, *Agamemn.* Ver. 153.

10. The *Jewish* Historian, speaking of the War of the other Tribes against the Tribe of *Benjamin*, says, that as soon as they were assembled at *Silo*, after having known what had been done to the *Levite's* Concubine, they would have taken up Arms against the Inhabitants of *Gaba*; but the Council of the principal Persons of the Nation restrained them by representing, that they ought not to proceed so soon to a War with their Countrymen, or before they had proposed their Grievances to them by a friendly Conference; and that they were obliged the more to use such Delay, as the Law did not permit their marching with an Army, even against Strangers, whatever Wrong they might think they had received, without first sending Embassadors to endeavour to obtain a reasonable Satisfaction from them. *Antiq. Judg.* Lib. V. Cap. II. *GROTIUS*.

The Law of *DEUTERONOMY* did not extend to all People, against whom the *Israelites* might make War. See Mr. *LE CLERC's* Comment. upon it.

11. In the Original it is *cum jure Gentium*. But our Author intended no doubt to say, *Jure Naturae* or *Jure Gentium communi*; taking thus the *Law of Nations* in the same Sense as the *Roman* Civilians, and not as his arbitrary Law of Nations, of which he does not yet speak.

12. *Cyrop.* Lib. II. Cap. IV. § 19. Edit. Oxon. *in fin.* Lib.

13. But if one of the Enemies has attacked the other without declaring War, and has reduced him to the Necessity of defending himself without giving him Time to

VII. 1. But this Denunciation is either conditional or absolute. Conditional, when Restitution is demanded at the same Time; but the Feacial (or Herald) Law¹ under the Notion of Things demanded, comprehends not only a Vindication of due by Right of Property, but also the Prosecution of it, whether due upon a civil or criminal Account, as² *Servius* well expounds it. Hence we meet in the form³ of it these Words, *to be restored, to be repaired, to be delivered up*; where *to be delivered up* (as we have said⁴ in another Place) is to be understood, unless they from whom they are demanded, should chuse rather to punish the Offenders themselves. *Pliny* declares, that this reclaiming of Things was called⁴ *Clari-*

VII. War denounced sometimes conditionally, and sometimes absolutely.

^a B. 2. ch. 21. § 4.

make a Declaration in form, shall not this War have the same Effect, as if it had been declared on one Side? And wherefore should the Attacked, who could not declare War, suffer, because the Aggressor, who could, did not declare it? Besides, we shall shew in the following Chapter, that the Effects meant by our Author, which are Impunity, and the Right of appropriating to ourselves what we take from the Enemy; that these Effects, I say, do not arise from the Declaration of War, nor from a pretended arbitrary Law of Nations, and that they are not particular to Wars declared in form. As to our Author's Division of *Declarations of War* into *conditional* and *pure or simple*; some Writers pretend, that it has no solid Foundation, and that every Declaration of War, in whatsoever Manner it be made, is conditional, either expressly or tacitly. For, say they, we ought always to be disposed to accept a reasonable Satisfaction, and the Moment an Enemy offers that, we cannot continue the War against him without great Injustice, even tho' the Declaration, which preceded it, was *pure and simple*. But, besides, that our Author here treats of the Law of Nations, which according to him, often imports no more than Impunity; the Manner, in which he explains his Division, supposes that he, against whom War is declared purely and simply, has already sufficiently shewn, that he had no Design to spare us the Necessity of taking up Arms against him. So far therefore the Declaration of War may well be pure and simple, without Prejudice to the Dispositions, wherein we ought always to be, with regard to the future, if the Enemy will hearken to Reason; which relates to the Conclusion, rather than Commencement of a War; to the latter of which the Distinction of *pure* and *conditional* Declarations belongs.

VII. (1) See PARUTA, *De Bello Cyprio*, Lib. I. PETER BIZAR. *Lib.* XXIII. where he speaks of the *Turks*: REINKING, *Lib.* II. *Class.* III. *Cap.* IV. GROTIUS.

2. [RES RAPUISSE LICEBIT] *Clarigationem exercere, hoc est per* Feaciales *bella indicere. Nam veteres laedere res, RAPERE dicebant, etiamsi Rapinae nullum crimen existeret: Similiter satis facere, res reddere dicebant.* In AENEID. X. Ver. 14.

3. This will be given in Note 8. upon this Paragraph.

4. *Clarigatio. Et Legati, quum ad hostes clarigatumque mitterentur, id est, res raptas clarè repetitum, unus utique Verbenarius vocabatur.* Hist. Nat. *Lib.* XXII. *Cap.* II. See also SERVIUS in *Aeneid.* XI. (Ver. 53.) and X. (Ver. 14.) The Naturalist in the Passage

gatio (because the Demand was made clearly and with a loud Voice.) A conditional denouncing of War is thus in ⁵ *Livy*, *They are resolved with all their Power to revenge that Injury, unless redressed by the Offender.* And in ⁶ *Tacitus*, *Unless they punish the Malefactors, they will put to Death without Distinction.* And of this Kind we have an old Precedent in *Euripides*, where *Theseus* orders his Heralds to tell *Creon* the *Theban*, <556>

⁷ *Your Neighbour Theseus friendly would obtain
A decent Burial for the thousands slain.
If this you grant, then, Thebes, you may depend,*

here cited, says, that one of the Heralds, who went to make the Summons, was called *Verbenarius*, because he carried *Vervain* to the Enemy: As is said elsewhere: *Nostrī Verbenacam vocant: Haec est quam Legatos ferre ad hostes indicavimus*, Lib. XXV. Cap. IX. GROTIUS.

5. *Eam se contumeliam injuriamque, ni sibi ab iis qui fecerint, dematur, ipsos omni vi depulsuros esse*, Lib. VIII. Cap. XXIII. Num. 7.

6. *Praemittit [Germanicus] literas ad Caecinam, venire se valida manu, ac ni supplicium in malos praesumant, usurum promiscuā caede*. *Annal. Lib. I. Cap. XLVIII. Num. 1.* He speaks there of the Revolt of Legions: So that it was a threatening of Chastisement, and not a Declaration of War.

7. Ἐλθὼν δ' ὑπέρ τ' Ἀσωπον, &c.

Supplic. Ver. 383. & seqq. There is a Declaration of War of the like Kind in the *Battle of the Frogs and Mice*, ascribed to HOMER, (*Batrachomyomach. Ver. 135. & seqq.*) In PLAUTUS's *Amphitryon* we see, that General sends first the principal Officers of his Army to the *Telebaeans*, to tell them, that if without coming to Blows, they would agree to restore what they had taken from the *Thebans*, and deliver up the Authors of those Violences, he would return with his Troops and leave them in Peace; and if not, he would immediately lay Siege to their City, and push it on with the utmost Vigour:

Principio ut illo advenimus, &c.

(*Act I. Scen. I. Ver. 48. & seqq.*) See also CROMER, *De rebus Polon.* Lib. XXI. GROTIUS.

In the Passage of POLYBIUS, to which the learned GRONOVIVS refers us here, I cannot tell whether any Thing is meant, but the Right of Reprisals, upon which our Author has cited the same Historian in the preceding Chapter, § 5. *Note 5.* The *Eleuthermeans*, suspecting that *Timarchus*, one of their Citizens, had been assassinated by the Order of *Polemocles*, Admiral of *Rhodes*, gave Permission at first to use Reprisals against the *Rhodians*, and afterwards declared War against them, *Lib. IV. Cap. LIII.* In my Opinion, far from departing here from the ordinary Signification of the Word *Πύσια*, it is very natural to apply it in this Passage. As to *condicere*, see the form of Declarations of War in the following Note.

Theseus, as well as Athens, is your Friend.
 If not, prepare for War, to meet with those
 Whom you have forc'd to be your deadly Foes.

Statius relating the same says,

Aut Danais edice rogos, aut praelia Thebis.
 Grant Burials to the Greeks, or look for War on Thebes.

Polybius calls this *ῥύσια καταγγέλλειν*, The old Romans, *condicere*. A pure (or absolute) Denunciation, is what is especially called an Indiction (or Proclamation) when either the other Party has begun the War (and this *Isidore*^b calls a War to repel an Enemy) or he himself has done something that deserves^c to be punished.

2. Sometimes a pure (and absolute) Denunciation follows a conditional one, tho' not necessarily, but over and above. Hence comes the usual⁸ Form, *I call the Gods to Witness that Nation is unjust, and will not*

^b See the Passage cited in § 5. n. 2.

^c See an Example in Bembus, L. 3.

8. *Si non deduntur, quos exposcit [Legatus] diebus tribus & triginta, (tot enim solennes sunt) peractis, bellum ita indicit: Audi, Jupiter & tu Juno, Quirine, Diique omnes coelestes, vosque terrestres, vosque inferni, audite. Ego vos testor, populum illum, (quicumque est nominat) injustum esse, neque jus persolvere. Sed de istis rebus in patria majores natu consulemus, quo pacto jus nostrum adipiscamur. Cum his nuntius Roman ad consulendum redit. Confestim Rex, his fermè verbis Patres consulebat: Quarum rerum, litium, causaram, condixit pater patratu Populi Romani Quiritium patri patrato priscorum Latinorum, hominibusque priscis Latinis, quas res dari, fieri, solvi, oportuit, quas res nec dederunt, nec fecerunt, nec solverunt, dic, inquit ei quem primum sententiam rogabat, quid censes. Tum ille: Puro pioque duello quaerendas censeo; itaque consentio, consciscoque. Inde ordine alii rogabantur: Quandoque pars major eorum, qui aderant, in eandem sententiam ibat, bellum erat consensu fieri solitum; ut Fecialis hastam ferratum, aut sanguineam praeustam, ad fines eorum ferret, & non minus tribus, puberibus praesentibus diceret: Quod populi priscorum Latinorum, hominesque prisci Latini, adversus populum Romanum Quiritium fecerunt, deliquerunt, quod Populus Romanus Quiritium bellum cum priscis Latinis jussit esse, Senatusque Populi Romani Quiritium censuit, consensit, conscivit, ut bellum cum priscis Latinis fieret; ob eam rem ego populusque Romanus populi priscorum Latinorum, hominibusque priscis Latinis, bellum indico facioque. Id ubi dixisset hastam in fines eorum emittebat. LIV. Lib. I. Cap. XXXII. Num. 9. 14. where the form of declaring War by the Romans is very curiously related at large. The late Mr. JAMES GRONOVIVS, in a long Note upon this Passage, has pretended, that our Author was deceived in believing after TURNEBIVS that the Word *Condixit*, used here in the Deliberation upon the War, signifies the preceding Summons, or the conditional Declaration of War. But I confess, the Reasons of that learned Man do not appear sufficiently strong*

to make me subscribe to his Criticism. He says that neither in LIVY nor elsewhere is it found, that the King at Arms (*Pater patratus*) was employed to make that Summons or Demand; that it was always attributed to the Heralds, without mentioning their Chief, and that LIVY in Chapter XXIV. of the same Book says very expressly, that the *Pater patratus* only took the Oath, and recited the Conditions in Treaties of Alliance. But it suffices, that this Chief did not go alone, and that he was attended by some other Heralds, in order to his being comprised under the general Name of *Feciales*: Now this is what SERVIUS says in so many Words, upon *Ver. 14. of B. X. of the Aeneid*, tho' he speaks elsewhere of the *Feciales* in general, without mentioning the *Pater patratus*. Unless therefore it be clearly proved, that in this Passage of LIVY, the Summons (*clarigatio*) is not meant, his Authority is of Use to explain, what other Authors and himself have said in a general manner, in Places, where the Question was not to describe more particularly a Thing, which they supposed sufficiently known. The Grammarian SERVIUS, in one and the same Passage, (one Part of which I shall cite presently, and the other in *Note II.*) after having said, that the Chief of the Heralds was the Person who declared War, ascribes that Declaration a little lower to the *Feciales* in general. As to the twenty fourth Chapter of LIVY, I find there indeed, that the *Pater patratus* is employed to treat of Alliances, but I find nothing which insinuates that this was his sole Business. And on the contrary, the Passages, cited also from SERVIUS, say, that the Heralds, and their Chief without Distinction, made Alliances and declared War: *Atqui Feciales & Pater patratus, per quos bella vel Foedera confirmabantur, numquam utebantur vestibibus lineis—Qua [verbena] coronabantur Feciales & Pater patratus foedera facturi, vel bella indicturi. In Aeneid. XII. 120.* Thus the order of the Things are changed, that we may not think the one regards the *Feciales*, and the other the *Pater patratus*. But here is an express Passage of the same Grammarian: *Quum enim volebant bellum indicere, Pater patratus, hoc est, princeps Feacialium, proficiscebatur ad hostium fines, & praefatus quaedam solennia, clara voce dicebat, se bellum indicere propter certas causas: Aut quia Socios laeserant, aut quia nec abrepta animalia, nec obnoxios, redderent. Et haec Clarigatio dicebatur a claritate vocis. In Aeneid. IX. 53.* He will have it moreover that the Word *Condicere* is only said of Things in regard to which the two Parties agree. But FESTUS tells us, that it signified in general to declare and make known: *CONDICERE est dicendo enuntiare.* In short the whole Connection of the Discourse, and even the Terms of the Deliberation upon the War, are repugnant to what is meant here by *condixit*, a Treaty lately made between the *Latins*, and the *Romans*, as he imagines who criticises our Author in this Place. The Historian describes in general the manner in which Satisfaction was demanded, and the War afterwards declared. Whence it is that after the refusal of restoring what was due, mention is made of a People, whosoever they were: *Populum illum (quicumque est nominat)*. The *Latins* are indeed named after: But that is because the Terms of Forms require their being determined to some particular People. And in the Form in Question, the first Words, *Quarum rerum, litium, causarum* plainly denote every Kind of Complaint in general, and all Affairs, about which they might have any Controversy with each other: So that they do not seem to me compatible with the Determination of the Sense of *condixit*, to the Ceremony of concluding a Treaty. But farther: The Historian says clearly, that the Reason, why Satisfaction was demanded of the *Latins* was their having made Incursions into the Territories of the *Romans*: *Et quum in-*

render what is right. And another of which Things, Differences and Causes, the Declaration has been made by the King at Arms of the People of Rome, to the King at Arms of the antient Latins, and to the People of the antient Latium, they have neither paid, given, nor done those Things they ought to have paid, given, or done; wherefore I judge, agree and declare, that Satisfaction be sought by a fair and just War. To which we will add a third Form, Because the antient Latin People have injured the People of Rome, and failed in their Duty, and because the People of Rome have commanded to make War against the antient Latins, and the Senate of the People of Rome have judged, agreed and resolved to declare War against the antient Latins; therefore I and the People of Rome do denounce and make War against the antient Latins. And that, in this Case, a Declaration of War was not thought absolutely necessary, does appear from <553 [[page numbers begin again from 553]]> hence, that it was sufficient, if it was but proclaimed at the next Garrison. As the Heralds in the Case of ⁹ Philip of Macedon, and afterwards of Antiochus, ¹⁰ gave their Opinion; whereas the first Time it was necessary to declare War to the Person himself, against whom it was intended to take up Arms. Nay, the War against Pyrrhus was denounced only to one of his Soldiers; and that in the Flaminian Cirque, where that Soldier was ordered to purchase a Place, for Form sake, as ¹¹ Servius observes on the 9th of the *Aeneid*.

3. Another Thing which shews that a pure and simple Declaration after a conditional one is needless, is that a Denunciation of War is often

cursionem in agrum Romanum fecissent, repetentibus res Romanis superbe responsum reddunt, Num. 3. He was not therefore speaking of the Violation of a Treaty: Of which it is probable he would not have omitted to say something. I insert this Note, as I composed it several Years ago at *Lausane*. I have since seen with Pleasure, that Mr. JENS in a good Dissertation, *De Fecialibus Populi Romani*, (which is Part of his *Ferculum Literarium* published 1717.) is exactly of the same Opinion with me, and tacitly refutes the late Mr. GRONOVIVS almost by the same Reasons. It may be seen, by what there is of more or less in the one and the other, and by the different manner in which our Arguments are turned; that as that learned Gentleman could not take from me, I have not robbed him. All the rest of his Dissertation is well worth reading.

9. *Consulique Feciales ab Consule Sulpicio, &c.* Livy, *Lib. XXXI. Cap. VIII. Num. 3.*

10. *Consul deinde Manius Acilius, &c. Idem, Lib. XXXVI. Cap. III. Num. 9, 11.*

11. *Denique, quum Pyrrhi temporibus, &c.* In *Aeneid. IX. 53.*

made by both Parties, as the *Peloponnesian*¹² War by the *Corcyreans* and *Corinthians*, when the denouncing of it by one would have been sufficient.

VIII. *In denouncing*

VIII. We must not confound with the Rules which properly belong to the Law of Nations, the Use of the *Caduceum*¹ established amongst the

12. See THUCYDIDES, *Lib. I. Cap. XXIX.* Edit. Oxon.

VIII. (1) It was a Staff, or Kind of Scepter, wrapped up in a Figure of Serpents twisted together. PLINY says, that the Use of this Figure came from a Sort of Eggs, formed by a Heap of Serpents twined and glued in a Manner to each other; so that this Staff was intended to be an Emblem of Peace between two Enemies, who reciprocally send Heralds with the *Caduceus* in their Hands, *Angues innumeri, aestate convoluti, &c.* *Hist. Nat. Lib. XXIX. Cap. III.* See also SERVIUS upon the *Aeneid.* *Lib. IV. (ver. 242.)* and *Lib. VIII. (ver. 138.)* GROTIUS.

It appears by the Passage of PLINY, which our Author only quotes, and still better by those of SERVIUS, to which he refers us; that the *Caduceus* was a Token of Peace rather than War, and therefore, that the proper Design of its Institution was not to declare War. The Commentator upon VIRGIL says expressly, that those who carried the *Caduceus* were Embassadors of Peace, as the *Feciales* were employed in declaring War. *Unde, secundum LIVIUM, legati pacis Caduceatores dicuntur. Sicut enim per Feciales, a foedere [dictos should be added here] bella indicebantur; ita pax per Caduceatores fiebat.* In *Aeneid.* IV. 242. See also ISIDORUS, *Orig. Lib. VIII. Cap. XI. Col. 1027.* Edit. *Gothofr.* SUIDAS calls the *Caduceus* *Σύνθημα φιλίας*, a Symbol of Friendship, (*voce Κηρύκειον*) which he has taken from POLYBIUS, *Hist. Lib. III. Cap. LII.* And AULUS GELLIUS informs us, upon the Authority of some antient Histories, that the General *Quintus Fabius*, intending to give the *Carthaginians* their Choice of War or Peace, sent them from the *Roman* People, a Pike and a *Caduceus*, as two Signs, the one of War and the other of Peace. *Quod Q. Fabius, Imperator Romanus, dedit ad Carthaginientes epistolam, ubi scriptum fuit Populum Romanum misisse ad eos hastam & caduceum, signa duo belli aut pacis, &c.* *Noct. Attic. Lib. X. Cap. XXVII.* But I find in THUCYDIDES, two Passages which prove clearly, that the Use of the *Caduceus*, supposed the War already declared. The first is in the Place where he relates the Sea-Fight between the *Corinthians*, and the People of *Corfu*. The latter being victorious, the others thought of retiring, but as they apprehended that the *Athenians*, who were come to the Aid of the People of *Corfu*, with a considerable Reinforcement, would look upon the Fight as a Rupture of the Alliance, and consequently, upon them as Enemies; they sent some Persons to them in a Skiff, without the *Caduceus*, to sound their Sentiments, says the Historian; which manifestly implies, they intended to shew on their Side, that they did not mistrust them, nor consider them as declared Enemies. *Lib. I. Cap. LIII.* Edit. *Oxon.* The other Passage is at the End of the same Book, where the Historian says, that notwithstanding all the Differences which he had related, the People of *Peloponnesus* had not discontinued their Commerce with each

Greeks; < 554 > that ² of Vervein, and the Spear made ³ of Cornil, amongst the Romans, who took it from the *Aequicolae*; the solemn Renunciation ⁴ of all Friendship and Alliance, if ever there had been any, with him against whom War was declared; a Renunciation made after the Term of thirty Days, in which he was allowed to restore what had been demanded; the Ceremony ⁵ of throwing once more a Spear into the Enemy's Ground; and such other Things which proceed merely from the peculiar Customs of some Nations. For ⁶ *Arnobius* tells us, that many

War, what belongs to the Civil Law and not to the Law of Nations.

other, and went freely into each other's Country, *without the Caduceus*, tho' not without some Mistrust. *Cap. CXLV.* The Historian says also, in the Beginning of the following Book that after the *Peloponnesian* War broke out, they had no longer any Communication without the *Caduceus*. See the *Greek* Scholiast upon the two last Passages.

2. See the Passages of *PLINY*, which are cited above, § 7. *Note 2* and *FESTUS*, on the Word *Sagmina*. *LIVY*, however, mentions the Use of this Herb only in the Ceremony of Treaties of Alliance, for which the chief Herald at Arms was sent. *Lib. I. Cap. XXIV. Num. 4, 5.* and *Lib. XXX. Cap. XLIII. Num. 9.* He says not a Word of it in the Place where he relates the Manner of demanding Satisfaction, and declaring War, tho' every Thing there seems well circumstantiated. Might not the Circumstances of those two Ceremonies have been confounded? We may be induced to believe so, from a Passage in *VARRO*, where that learned *Roman* says, that *Vervein* was to the *Romans* what the *Caduceus* was amongst the *Greeks*; namely, a Token of Peace; *pacis signum VARRO pronuntiat. De Vita Populi Romani. Lib. II. Verbenatus ferebat verbenam; id erat Caduceus, pacis signum, nam Mercurii virgam possumus aestimare. Apud NON. MARCELL. p. 528. Edit. Paris. 1614.*

3. That Javelin was burnt at the End, as *LIVY* says, who puts also the Alternative of a Javelin, headed with Iron. See the Passage cited in *Note 9.* upon the preceding Paragraph.

4. This is what *LIVY* tells us the College of Heralds were consulted upon, in the War against *Antiochus* and the *Aetolians*. *Et num prius societas eis [Aetolis] & amicitia renuntianda esset, quam bellum indicendum. Lib. XXXVI. Cap. III. Num. 10.*

5. See *SERVIVS* upon the ninth Book of the *Aeneid*, (ver. 53.) and *AMMIANUS MARCELLINUS*, *Lib. XIX. (Cap. II. p. 229. Edit. Gron. Vales.)* with the Note of the learned *LINDENBROG* upon that Passage. *GROTIUS*.

Our Author supposes in this Place, that the Heralds threw a Javelin twice into the Enemy's Lands, *Hastae missio iterum*. But he was mistaken, through his misunderstanding the Sequel of the Discourse, in the Passage of *SERVIVS* which he cites; as it would be easy for me to prove.

6. It is in the Place where, to retort the Reproach of Novelty thrown on the Christians, he shews that the *Romans* themselves had in many Things abandoned the Customs of their Ancestors. Amongst others he gives for an Example, that the College

of these Formalities were left off in his Time, and some disused, even in ⁷ Varro's Days. <555> The third Punic War ⁸ was both denounced, and commenced at the same Time. And ⁹ Maecenas, in Dion, will have some of these Ceremonies to be peculiar to popular States only.

of the *Feciales*, or Heralds at Arms, were no longer consulted in Regard to War, nor sent to demand Satisfaction in Form, before the Declaration of War; and that the Time for beginning a War was no longer signified by a Flag displayed upon the Capitol. *Quam paratis bella, signum monstratis ex Arce? Aut Fecialia jura tractatis? Per clarigationem repetitus res raptas?* Adversus Gentes, Lib. II. p. 91. Edit. Ludg. Batav. 1651.

7. I shall set down the Passage wherein he informs us, that in his Time the *Feciales* were still employed in making publick Treaties, but not in declaring War. *Feciales, quod fidei publicae inter Populos praeerat: Nam per hos fiebat, ut justum conciperetur bellum, (& inde desitum) & ut foedere fides pacis constitueretur. Ex his mittebant, antequam conciperetur, qui res repeterent: & per hos etiam nunc sit foedus, &c.* De Ling. Lat. Lib. IV. p. 23. Edit. H. Steph. As for these Words, & *inde desitum*, I am inclined to believe that the Author wrote *sed inde desitum*. The Change of *sed* into & might very easily happen. Mr. JENS, in his Dissertation cited above, p. 64. suspects that there is another Word corrupted in this Place; *conciperetur* for *conscisceretur*.

8. It is from APPIANUS *Alexandrinus*, that our Author has taken this Circumstance. *De bell. Punic.* p. 69. Edit. Amstel. (43. H. Steph.)

9. Our Author had probably in his Eye the long Discourse made by *Maecenas* to *Augustus*, when the latter asked his Advice with Regard to his Design of abdicating the Government of the Republick. But I find nothing, either in this Discourse or that of *Agrippa*, that relates to the Forms used in Declarations of War. The Origin of the false Citation is this, ALBERICUS GENTILIS, *De Jure Belli*, Lib. II. Cap. I. *in fin.* p. 218. remarks, that *Maecenas*, (apud DION. Lib. LII.) seems to say, that only Democratical States observe the Formalities with which Declarations of War are attended. What gave the *Italian* Civilian Occasion to form this Conjecture, was the Passage where *Maecenas* says, that in advising *Augustus* to retain the Government of the State, he does not pretend to persuade him to act as a Tyrant, but only to regulate, in Concert with the chief Men of *Rome*, all the Affairs of the State, in a just Manner, and conformably to the Good of the Publick. He represents at the same Time, that the State would thus be much better governed, and in Consequence more happy, than if the supreme Authority were put into the Hands of the People. *When it shall be necessary* (says he, amongst other Things) *to undertake a War, you will do it secretly, and by making good Use of favourable Occasions.* p. 542. E. Edit. H. Stephens. The War here meant is not one made rashly, and without being declared; but *Augustus's* Courtier, as appears from the Sequel of his Discourse, opposes Wars undertaken wisely to dangerous Wars, in which the *Romans* had been engaged by the tumultuous Deliberations of the People; Secresy not being observed in them, and the ambitious great Men finding Means to win the Populace, and to make them consent to take Arms under their Conduct. This is the true Sense of the Passage: Our Author has followed, without Hesitation, that which GENTILIS spoke with some Doubt.

IX. War denounced against a Sovereign, is presumed at the same Time to be denounced, not only against all his Subjects, but also others who shall join him, and who ought to be considered, in Regard to him, only as an Accessory. And this our modern Lawyers mean, when they say, ¹ *A Prince being defied, all his Adherents are defied.* For to denounce War they call *diffidare*, to bid Defiance, which is to be understood of that very War which is made upon him against whom it is proclaimed. Wherefore, when the *Romans* had declared War against *Antiochus*, they would not do it separately against the *Aetolians*, because they openly sided with him. ² The Heralds replied, *The Aetolians have voluntarily proclaimed the War against themselves.*

IX. War denounced against a Prince, is denounced also against his Subjects, and all his Adherents.

X. But that War being ended, if we are to attack any other Prince, or People, for having assisted in the War, we ought to denounce War anew, to obtain the Effects of a just War by the Law of Nations. For they are not then looked on as Accessories, but as Principals; ¹ wherefore it is well observed, that the War of *Manlius* against the *Gallo-Greeks*, and of *Caesar* against ² *Ariovistus*, were not ³ <556> just by the Law of Nations: For

X. But not by themselves considered, this illustrated by Examples.

IX. (1) *Diffidato Principe, diffidati ejus adherentes.* See BALDUS, *Ad Leg.* II. Code, *De Servis*, Num. 70. For in their barbarous Phrase *Diffidare* signifies to declare War.

2. *Feciales responderunt.*—Aetolos *ultra sibi, &c.* LIVY, *Lib.* XXXVI. *Cap.* III. Num. 13.

X. (1) See what is said above, *B. I. Chap.* III. Num. 4.

2. Mr. BUDDEUS, in his Dissertation intituled *Jurisprudentiae Historicae Specimen*. § 110. subscribes here to our Author's Opinion, which is also that of the Generality, even of his Commentators, except OBRECHT. The latter, speaking of the Case in Question, upon the Passage cited in the preceding Note, which however relates to another Thing, contents himself with referring to *Chap.* XXXV. of *B. I.* of CAESAR's own Commentary upon the War in *Gaul*. CAESAR there, alledging his REASONS for undertaking the War with *Ariovistus*, says, amongst other Things, that in the Consulship of *Messala* and *Piso*, the Senate had decreed, that whoever should be Proconsul of *Gaul*, should defend the *Eduans*, and the other Friends of the *Roman* People, as much as he could, without Prejudice to the Welfare of the Republick. *Quoniam* M. Messala M. Pisonem, *Coss. &c.* BOECLER, in his Dissertation *De Actis Civitatis*, Vol. I. p. 887. approves this Reason, and confirms it by the Example of CICERO, who, when Proconsul of *Cilicia*, believed himself authorized to act something like it, by Vertue of a like Decree of the Senate, as appears from what he says himself, *Lib.* XV. *Epist. Ad Familiam*. II. FLORUS also speaks of *Caesar's* Expedition

they were not now Accessories of another War, but attacked as Principals, on which Account, as a Denunciation of War was requisite by the Law of Nations, so a new Decree of the *Roman* People was necessary by the Laws of *Rome*.⁴ If the Consent of the People to make War against *Antiochus* was desired in this Form, *Is it your Will and Pleasure that War be made against Antiochus, and his Adherents?* Which was also observed in the⁵ Decree against King *Perseus*: It ought to be understood thus, as long as that War should continue against those two Kings, and their Adherents.

against *Ariovistus*, as of a very just War. *Sed prima contra Germanos illius pugna, justissimis quidem ex causis: Haedui enim de incursionibus eorum querebantur. Quae Ariovisti superbia? &c.* *Lib. III. Cap. X. Num. 10.* And *DION CASSIUS* makes *Caesar* say, that the extraordinary Command decreed him by the Senate and People of *Rome*, included a Permission to undertake War against whomsoever he should think fit. *Lib. XXXVIII. p. 96. B. Edit. H. Steph.* So that the Question only is to know whether *Caesar* had good Reasons for making Use of this Permission. It is not denied but that this Conqueror might have been prompted by his Ambition, which made him seek and embrace eagerly all Occasions for taking up Arms: But as the Thing itself, and not the secret Motives, is the Matter in Question, it suffices that *Ariovistus* had given him just Occasion to attack him. Now this is what the late Mr. *CELLARIUS* proves very well in a good Dissertation, *De C. Julii Caesaris adversus Ariovistum Regem, aliosque Germanos Bello*; which is the sixth of the Collection, published *MDCCLXII*. *Ariovistus*, says he, had no Right to appropriate a Part of *Gaul* to himself: That Prince pretended in vain, that he had made himself Master of it by Right of Conquest. Admitting that he had Reason for passing the *Rhine*, and for joining the *Sequani* against the *Haedui*, why did he not return home after the War was ended? Why did he oppress both his conquered Enemies, and the Conquerors his Friends, by loading the former with Imposts, and depriving the latter of the best Part of their Lands. It was besides the Interest of the *Romans*, not only to protect the *Haedui*, their Allies, but also to hinder *Ariovistus* from continuing too long in *Gaul*. The Example of the *Cimbri* and *Teutones* gave them just Reason to apprehend lest the Fancy should take him to enter their Province, and settle in it.

3. In the same Class may be placed the War made by *Ulysses*, and his Companions, against the *Ciconians*, who, during the Siege of *Troy*, had sent Aid to *Priam*, under the Command of *Mentes*. See *HOMER*, *Odys.* *Lib. VIII.* and the *Scholia* of *DIDYMUS*, upon *Ver. 40.* *GROTIUS*.

4. *Patres rogationem ad Populum, &c.* *LIVY*, *Lib. XXXVI. Cap. 1. Num. 5.*

5. *Senatus consultum inde factum, &c.* *Idem. Lib. XLII. Cap. XXXI. Num. 1.*

XI. The Reason why a solemn Proclamation was required unto such a War as by the Law of Nations is called just, was not (as ^a some imagine) to shew that they would do nothing in Secret, or by Deceit; for this Motive would not tend so much to establish any Right as to distinguish them by an extraordinary Valour and Generosity. As some Nations ¹ (we read) have appointed both the Time and Place of Battle. But that it might manifestly appear, that the War is not made by a private Authority, but by the ² Consent of both Nations, or of their Sovereigns. For hence

XI. *The Reason why Denunciation is requisite to some Effects of War.*

^a *Alb. Gentilis, l. 2. c. 2.*

XI. (1) As the *Romans* did to *Porsenna*, as PLUTARCH relates, in the Life of *Publicola*. The *Turks* two Days before a Battle make Fires in several Places. CHALCONDYLAS, *Lib. VII.* GROTIUS.

See what is said, *Chap. I.* of this Book, § 20.

2. But are People more assured of that, when a Herald comes to declare War with certain Ceremonies, than they would be when they see an Army upon their Frontiers, commanded by some principal Person of the State, and ready to enter the Country? On the contrary, might it not more easily happen, that a Person, or some few Persons, should assume the Character of Heralds, than that one Man should raise an Army by his own Authority, and march at the Head of it to the Frontiers, without the Sovereign's Privity? And the Thing could still less be supposed to happen on both Sides. The Truth is, that the principal End of Declarations of War, or at least what occasioned the Custom of them to be established, was, as some Commentators upon our Author observe, to make known to all the World, that there was just Cause for taking up Arms, and to signify to the Enemy himself, that it had been, and still was, his Fault, if he did not avoid it. I find in NONIUS MARCELLUS, a Passage of VARRO, part of which our Author has cited elsewhere, (Preliminary Discourse, § 27.) from whence it appears clearly, that this was the Opinion of the antient *Romans*. They undertook no War hastily, says he, or without just Cause; from whence it was that they declared it beforehand, and established, for that Purpose, some Heralds at Arms, whom they sent, to the Number of four, to demand Satisfaction of those from whom they believed they had a Right to exact it. This is visibly the Sense of the following Words, tho' not very correct in some Places, *Itaque bella & tardè & magna licentia*, [MERCIER tells us it is writ so in all the Manuscripts, instead of *nulla licentiâ*, which was in the other Editions. Might not *magna decentia* be read, a Term of which that Grammarian cites an Example, p. 203. from CICERO? for the Explanation MERCIER gives us here, *valde licito*, appears too subtle] *suscipiebant: Quòd bellum nullum, nisi pium, putabant geri oportere, prius indicerent*, [*indicebant* probably should be read, a Word, which having been changed by the Copyists into *indicerent*, has occasioned the foisting in *quam* after *prius* in the preceding Editions] *bellum iis, a quibus injurias factas sciebant: Feciales legatos res repetitum mittebant quatuor, quos Oratores vocabant*. In Voce *Feciales*, p. 529. *Edit. Mercer.* DIONYSIUS HALICARNASSENSIS refers also to the extreme Regard the *Romans* had to Justice in their Wars, the Establishment of

arise certain peculiar Effects, which in a War against Robbers, or a War <557> made by a Prince against his own Subjects, will not be allowed. Therefore ³ *Seneca* distinguished Wars denounced against Neighbours from Civil Wars.

XII. *That those Effects are not to be found in other Wars.*

^a *Ayala*, l. 1. c. 1.

^b *Alberic. Gentil.* l. 2. c. 2.

XII. Now, as ^a some observe, and by Examples teach, that even in such Wars as these, whatever is taken becomes the Captor's, ¹ it is true but only on one Side, and that too by the Law of Nature; and not by the voluntary Law of Nations, which only provides for the Interest of Nations, not of those who are either no Nation, or but Part of one. They are also mistaken that ^b think a War, undertaken in Defence of our Persons or Goods, needs no Denunciation. ² For it is absolutely necessary, indeed not simply, but to obtain the Effects proper to a just War, as we have already mentioned, and shall more fully explain by and by.

XIII. *Whether a War may be made as soon as denounced.*

^a § 6. n. 6. & § 8. in fin.

XIII. Neither is that true, that War cannot justly be made as soon as it is proclaimed, which *Cyrus* did against the *Armenians*, and the *Romans* against the *Carthaginians*, as I said ^a before. For by the Law of Nations, a Denunciation ¹ requires no Time to be allowed after it; but it may

the College of the *Feciales*, and in particular, the Function of declaring War, with which these were charged. *Antiq. Rom.* Lib. II. Cap. LXXII. The Grammarian *SERVIVS* is of the same Opinion, in a Passage which our Author has quoted several Times: He says, that *Ancus Marcius* seeing the *Roman* People too fond of War, and that they often engaged in it without just Cause, borrowed from the *Aequicolae* the *Fecial* Law. *Sed Ancus Marcius, quum videret Populum Romanum ardentem amore bellorum, &c.* In *Aeneid.* X. 14. It does not appear, that in all this they thought of the Effects of which our Author speaks.

3. *Ad arma protinus, &c.* De Ira, Lib. III. Cap. II.

XII. (1) See what I shall say, *Chap.* VI. of this Book.

2. But see what I have already said in *Note* 13. upon *Paragraph* 6. of this Chapter.

XIII. (1) This is required even by the Law of Nature itself, as often as it can be done without Prejudice to ourselves, even tho' there is not much Hope that he, against whom War is declared, should be inclined to prevent it, by giving us Satisfaction. For we ought to neglect no Means of letting all the World know, and even the Enemy himself, that we do not take Arms to obtain or defend our just Rights, till reduced to the last Extremity, and after having tried all other Methods, and given the Enemy full Time to come to himself.

happen, that by a natural Right some Time may be required from the Quality of the Business, as if Restitution be demanded, or Punishment required against an Offender, and not yet denied; for then convenient Time is to be granted for the performing it.

XIV. Nay, tho' the Rights of Embassadors should be violated, it will not thence follow, that there is no Need of Denunciation to obtain those Effects proper to a just War; but it will be sufficient if it be done the safest Way it can, that is, by Letters: As it is usual, in Law, to give a Summons or Intimation, in Places that are not safe.

*XIV. Whether
against him
that has vio-
lated the Right
of Embassadors
a War may be
made, tho' not
denounced.*

The Right of killing Enemies in a solemn War; and of other Hostilities committed against the Person of the Enemy.

I. *The Effects of a solemn War generally explained.*

I. *Servius* upon this Verse of *Virgil's*,

¹ *Tum certare odiis, tum res rapuisse licebit.*

*Then is your Time for Faction and Debate,
For partial Favour, and permitted Hate.*

Dryden.

Deriving the Feacial (or Herald) Law from *Ancus Marcius*, who had borrowed it himself from the *Aequicolae*, says thus, ² *When Men or Cattle were taken from the Romans by any other Nations, the Pater Patratus (King at Arms) with some other Heralds, whose Office it was also to make Treaties of Alliance, went to the Borders of that Nation, and standing there, with a loud Voice proclaimed the Cause of the War; and if they would not restore the Things taken, or deliver up the Offender, (within thirty Days) he threw a Javelin into their Territories, which was the <558> Beginning of Hostilities, and then it was lawful to plunder, as is usual in War. But he had before said, that The Antients by ³ plundering, (Res rapere) understood the damaging what belonged to the Enemy, tho' nothing be taken from him: And by restoring what was redemanded (Res reddere) they meant all Man-*

I. (1) *Aeneid*. Lib. X. ver. 11. & seqq.

2. *Nam si quando homines aut animalia, &c.* In *Aeneid*. Lib. X. ver. 14.

3. These Words have already been cited, upon Paragraph 7. of the preceding Chapter, *Note 4.*

ner of Satisfaction for the Injury done. Whence we learn, that a War solemnly denounced between two Nations, or their Sovereigns, ⁴ has some peculiar Effects, which do not follow from the Nature of the War itself: Which is very agreeable to what we have already ^a quoted from the Roman Lawyers.

^a Ch. 3. § 1.

II. 1. But we must observe, that this Word *Licebit*, will be lawful, in *Virgil*, is capable of a double Meaning. For sometimes that is said to be lawful which is altogether just and honest, tho' perhaps, some other Thing may be more commendably done, as that of the Apostle *St. Paul*, Πάντα μοι ἔξεστιν, ἀλλ' οὐ πάντα συμφέρει, *All Things* (of the same Nature with those he had begun to speak of, ¹ and of which he was going to speak further) *are lawful for me, but all Things are not expedient*, 1 Cor. vi. 12. Also to marry is lawful, but to abstain from ² Marriage with a pious

II. *The Word Lawful distinguished into what may be done with Impunity, tho' not without a Crime, and what is not criminal, tho' it were an Act of Virtue to let it alone; with the Addition of several Examples.*

4. I do not see how our Author can deduce this Consequence from the Passage of *SERVIVS*. It is plain, in my Opinion, that all the Grammarian means, is, that before War was declared, in the Manner which he informs us was usual, it was allowed to plunder; because, before that, the People of whom there was Room to complain were not yet considered as Enemies; in a Word they were not yet at War.

II. (1) He speaks of Things indifferent in themselves, as is the Use of all Kind of Meats without Distinction, from which, however, we ought to abstain, when eating them *is not expedient*; that is to say, when some bad Effect, either in Relation to others, or ourselves, may result from it. But then those Things become *obligatory*; and consequently, the Passage makes nothing to the Subject. See what our Author himself says, in his Notes upon the New Testament.

2. *TERTULLIAN* against *Marcion*, I. *Abstinence from Marriage would be no Matter of Commendation, if Licence (to marry) were taken away*. See the same Author, *B. I. Ad uxorem*, upon this Subject, and concerning Flight in Times of Persecution; and *St. JEROME* against *Helvidius*, *A Virgin deserves the greater Honour, while she disdains that, which to do were no Sin*. And against *Jovinian*, *Therefore does CHRIST love Virgins the more, because they freely give what was not commanded them*: And to *Pammachius*, *Difficult and heroical Actions are always left to the Choice of those who have Courage to undertake them, that, as they are free, they may be worthy of Recompence*. And *Saint CHRYSOSTOM*, upon 1 Cor. vii. declares *Continence to be the better*; and upon *Rom. vii. 6*. *If we keep not the Commandments, we are threatened with Hell, thereby shewing that Things positively commanded, are not like those that are left to the free Choice of the Combatant, (such are Virginity, and the renouncing of our Possessions) but the others must of Necessity be performed*: And in his second Oration, concerning *Fasting*, *He left Virginity without the Lists, he left it above what we are commanded to strive for, so that they who keep it may shew the Greatness of their Soul, and they who do not may enjoy*

^a Lib. I. c. 18. Intent is more laudable, as St. *Augustine* ^a argues to *Pollentius*, out of the same Apostle. To marry a second Time is likewise lawful; but to marry but once is more laudable, as ³ *Clemens Alexandrinus* rightly decides the Question. A Christian Husband may lawfully put away a Heathen Wife, as Saint *Augustine* ^b allows (which, with what Circumstances it may be proved, is not our Business here to dispute) but yet he may keep her. Therefore he adds, ⁴ *Both are equally lawful by the Rules of Justice, which our Saviour hath given us, for he hath prohibited neither of them, but both are not equally expedient.* *Ulpian* says of a Trader, who was permitted, by the *Roman Law* to pour out the Wine, if the Buyer did not come to fetch it at the Time appointed, ⁵ *Tho' he may do it, yet if he did it not he is more to be commended.* <559>

^b *Ad Pollent.*
l. I. c. 13. and
18.

2. This ⁶ Word *Licere*, to be lawful, may be taken for that which is not punishable by human Laws, and yet is not consistent with Piety, or

the Favour of GOD. Which he afterwards applies to ἀκτημοσύνη, *The Renouncing of Possessions.* To which we may add what *GRATIAN* gathers out of St. *AUSTIN*, and others. *Caus. XIV. Quaest. I. GROTIUS.*

This Distinction between *Counsels* and *Precepts*, and the Application of it to the Examples here given by our Author, have been sufficiently refuted, *B. I. Chap. II. § 9. Note 19.*

3. *STROMAT. IV.* where, among other Things, he speaks of one married a second Time, *He does not indeed sin against the divine Covenant, for there is no Law that forbids it; but he does not fulfil that most excellent Perfection of an evangelical Life.* *GROTIUS.*

That Father speaks here indeed of second Marriages, but in the Words immediately going before he seems to speak of Polygamy in general, as simply contrary to evangelical Perfection, whether a Man has several Wives one after another, or at the same Time. He says, that *GOD* not only permitted, but required, under the Law, that Men should marry in that Manner, for the Multiplication of Mankind. Ἄλλ' ὁ αὐτὸς ἀνήρ, &c.

4. *Heic autem ubi de dimittendo, &c. Ad Pollent. De adulter. conjug. Lib. I. Cap. XIX.* See *Canon Law, Caus. XXVIII. Quaest. I. (Cap. VIII. IX.)* where many Things have been copied from *Chap. XIV. and XVIII. GROTIUS.*

5. *Si tamen quum posset effundere, Digest. Lib. XVIII. Tit. VI. De periculo & commodo rei venditae, Leg. I. § 3.* This Example is ill applied. See what I have said upon *PUFENDORF, Law of Nature and Nations, B. V. Chap. V. § 3. Note 8. of Edition II.*

6. *TERTULLIAN*, in his Exhortation to Chastity, *Permission often exposes one to the Temptation of violating the Rules of the Gospel: And again, all Things are lawful, but we cannot do every Thing that is lawful without Prejudice to Salvation.* And *COLUMELLA*, in his Preface to *B. VII. Neither must we take Advantage of whatsoever is lawful,*

the Rules of Morality. Thus, in many Countries, Fornication is allowed. Among the ⁷ *Lacedemonians* and *Aegyptians*, Theft was lawful. We read in *Quintilian*, ⁸ *There are some Things not commendable in their own Nature, yet tolerated by the Law, as by that of the Twelve Tables, the Body of the Debtor might be divided amongst the Creditors.* Indeed this Acceptation of the Word *Licere*, to be lawful, is not very proper, ⁹ as *Cicero* observes in the fifth of his *Tusculan Questions*. Speaking of *Cinna*, *On the contrary I think him miserable, not only because he did such Things, but because he so managed, that he might lawfully do them, tho' it is not lawful for any Man to do ill, but we are misled by the Error of Speech, when we say that is lawful which is only allowed.* But yet it is very common, as when the same *Cicero*, in Behalf of *Rabirius Posthumus* thus addresses the Judges, ¹⁰ *Ye ought to consider what is suitable to be done, not what you may do by Strictness of Law, for if you regard what is strictly lawful, you may put to Death whom you please.* Thus it is said, ¹¹ it is lawful for Kings to do what they please, because they are ἀνευπέυθουνοι, *exempted from Punishment amongst Men*, as we have said ^c elsewhere. But *Claudian* ^c B. i. ch. 3, 4. well advises a Prince or Emperor, when he says,

for the Antients reputed Summum jus, the Rigour of the Law, to be the greatest Torment. And St. JEROM, *The Rigour of Law is the highest Wickedness.* Ep. ad Innocent. GROTIUS.

7. See PUFENDORF, B. VII. Chap. I. § 3. *Law of Nature and Nations.*

8. *Sunt enim quaedam, &c.* Instit. Orat. Lib. III. Cap. VI. p. 173. Edit. Obrecht. But Mr. BYNKERSHOEK has shewn, in his *Observat. Jur. Civ.* Lib. I. Cap. I. that this Orator, and some other antient Authors, have mistaken the Law of the Twelve Tables, which only signifies, that the Creditors might sell their Debtor by Auction, in Order to divide the Price of his Liberty between them. This is not the only Instance wherein Moderns have understood certain Passages of Antiquity better than antient Authors.

9. In speaking of CINNA, who had unjustly put some illustrious *Romans* to Death. *Beatusne igitur, qui hos interfecit, &c.* Tusculan. Quaest. Lib. V. Cap. XIX.

10. *Heic jam, judices, vestri consilii res est, &c.* Orat. pro C. Rabir. Posthum. Cap. V.

11. This is what St. CHRYSOSTOM says, where he speaks of St. *John the Baptist*, who, notwithstanding that, presumed to say to King *Philip Herod*, and with Authority: It is not lawful for you to have this Wife. *De Poenitent.* VIII. GROTIUS.

¹² *Nec tibi quid liceat, sed quid fecisse decebit,
Occurrat mentemque domet respectus Honesti.*

*Think not what is by strictest Law allow'd,
But what by Truth and Conscience is avow'd.*

And ¹³ *Musonius* blames those Princes, *Μή τὸ, καθήκει μοι, λέγειν μεμεληκότας, ἀλλὰ τὸ ἕξεστί μοι, Who say thus I can do, rather than thus I should do.*

3. And in this Sense we find *Licet*, it is lawful, and *Oportet*, it behoveth, often opposed to each other, as by ¹⁴ *Seneca* the Father, in his Controversies. And in *Ammianus Marcellinus*, ¹⁵ *Some Things are not fit to be done, tho' they may be lawfully done.* And *Pliny*, ¹⁶ in his Epistles, *We should avoid Things that are dishonest, not because they are unlawful, but shameful.* And *Cicero*, ¹⁷ in his Oration for *Balbus*, *Some Things are not fit to be done, tho' lawful.* And for *Milo*, ¹⁸ he refers to natural Right what is just or innocent, and to the Laws what is permitted. <560> So *Quintilian* ¹⁹ the Father, in one of his Declamations tells us: It is one Thing to have a regard to the Laws, and another to consider what Justice demands.

12. *De IV. Consul. Honor. ver. 267.*

13. *STOBAEUS* has preserved this Saying. The Philosopher added, that the Princes who use such Language to their Subjects, do not long retain their Dignity. *Florileg. Tit. XLVI. (or XLVIII.) Admonit. De Regno. p. 328. Edit. Gesner. 1549.*

14. He gives, for Instance, the Permission of going into Bawdy-Houses. *Potest, inquit, Haec enim Lex, quid oporteat, quaerit; aliae, quid liceat. Licet ire in lupanar. Lib. IV. Controv. XXV. p. 308.*

15. *Dissimulans scire, quod sunt aliqua, quae fieri non oportet etiamsi Licet. Lib. XXX. (Cap. VIII. p. 657. Edit. Vales. Gron.)*

16. *Oportet quidem, quae sunt inhonesta, non quasi illicita, sed quasi pudenda, vitare. Lib. V. (Ep. XIV. Num. 9. Edit. Cellar.)*

17. *Est enim aliquid, quod non oporteat, etiamsi Licet. (Cap. III.)*

18. *Ut eum nihil delectaret, quod aut per naturam Fas esset, aut per leges Liceret. Cap. XVI.*

19. *Ego porro non hanc interpretationem istius verbi video ut jura spectanda sint, sed illud aliquando, uti justitia spectetur. Declam. CCLI. (See also Declam. CCCLXVI. in fin.)*

The Reader, upon this Subject, may see my two Discourses, *De Legum permission. & Benefic.* which are annexed to the fourth Edition of *PUFENDORF's De Offic. Homin. & Civis.*

III. Therefore in this Sense it is lawful for one Enemy to hurt another, both in Person and Goods, not only for him that makes War on a just Account, and does it within those Bounds which are prescribed by the Law of Nature, as we have said ^a in the beginning of this Book, but on both Sides, and without Distinction; so that he cannot be punished as a Murderer, or a Thief, tho' he be taken in another Prince's Dominion, neither can any other make War upon him barely upon this Account. And in this Sense we are to take *Sallust*, ¹ *By the Laws of War all Things are lawful to the Conqueror.*

III. *The Effects of a solemn War generally considered, refer to Lawfulness with Impunity.*

^a *Ch. 1. § 2. & seq.*

IV. The ¹ Reason why this was established by Nations, is because when two States are engaged in War, it would be dangerous for any other to

IV. *Why such Effects were introduced.*

III. (i) L. *Sulla cui omnia in victoria, &c.* (Orat. II. *Ad Caesar. De Republ. Ordinanda, Cap. XLVIII.* p. 126. Edit. Wasse) *SENECA* makes *Pyrrhus* say the same Thing in one of his Tragedies:

Quodcumque libuit facere Victori, licet.
Troad. (Ver. 335.)

IV. (i) It is not necessary to suppose here a tacit Consent of Mankind, or an arbitrary Law of Nations, of which the Reality cannot be proved. We can produce very good Reasons, founded on the Law of Nature itself, and which take Place with regard to other Wars, besides those that are publick and declared in form, to which our Author without Reason confines the Impunity he speaks of. Let us suppose, that in the Independence of the State of Nature, thirty Heads of Families, inhabiting the same Country, but having no other Tye amongst them, than that of Neighbourhood or Friendship, which Neighbourhood might occasion; should form a League amongst themselves to attack or repel a Body, composed of other Heads of Families: I say, that neither during that War, nor after its being terminated, those of the same Country, or elsewhere, who had not joined in the League of either Side, ought or could punish as Murtherers or Robbers, any of the two Parties who should happen to fall into their Hands. They could not do it during the War: For that would be espousing the Quarrel of one of the Parties, and as they continued Neuter at first, they had evidently renounced the Right of intermeddling in what should pass in the War. And much less could they do it after the Conclusion of the War; because as the War could not be concluded without some Sort of Accommodation or Treaty of Peace, the Parties concerned were reciprocally discharged from all the Evils they had done to each other. This the Interest of human Society also required. For if those, who continued Neuter, had however been authorised to take Cognizance of the Acts of Hostility, exercised in a War of others, and to punish such as they believed to have committed unjust ones, or to take up Arms on that account, instead of one War, two or

pronounce on the Justice of their Cause, for by that Means that State might quickly be involved in a War with other People, as the ² Inhabitants of *Marseilles* argued in the Cause of <561> *Caesar* and *Pompey*; that it did not belong to them, nor did their Forces permit them to determine, which had the juster Cause. Besides, even in a just War it is

more might have arisen and proved a Source of Quarrels and Troubles. The more Wars became frequent amongst Mankind, the more it was necessary for their Tranquillity, as well to avoid espousing rashly other People's Quarrels, as, when it was not judged proper to take Part in a War, to consider all that should pass in such a War, as authorised by the Right of Arms. The Establishment of civil Societies only rendered this Impunity the more necessary; because Wars then became, if not more frequent, at least more extensive, and attended with a greater number of Evils. There is nothing then here, which either requires the general Consent of Nations, or is peculiar to Wars made between two Sovereigns, and declared in form. The Effect in Question, is founded on one of the clearest and most general Laws of natural Right, and the Custom of most Nations, conformable to it, only renders the Practice of it more indispensable, since, as I have observed several Times, we are, and ought to be, deemed to conform to a known Custom, when we do not declare at a proper Time that we intend not to follow it. Our Author excepts the Wars against Robbers and Pirates: But he probably makes the Exception only with respect to them, as he has done above, in regard to the Right of appropriating to ourselves Things taken in War, § 12. of the preceding Chapter. Now, if those Robbers have not the Privilege of Impunity, it is because they are Robbers, (See DEMOSTHENES, *Orat. de Halones. Princ.*) and consequently People, whose Acts of Hostility are all manifestly unjust, the declared Enemies of Mankind: Whereas in other Wars, it is often very difficult to determine which Side is in the Right; so that the Affair remains, and ought to remain, undecided, with regard to those, who have joined neither Party. As to civil Wars, which our Author excepts also, the Reasons I have alleged are still stronger with regard to them, than with regard to the Wars made between two Kings, or two States; because the Constitution of civil Societies, and the Peace of Mankind make it still more requisite, that Strangers should not rashly intermeddle in what passes within a State. And it is quite another Question, whether Impunity, and the Right of appropriating to ourselves what is taken in War, have, or have not, Place amongst the Members of the same civil Society, either in the Wars of one Part of a Republick against the other, or in those of a King against his Subjects: The Decision of that Question depends on other Principles. In fine, I do not see, that the Declaration of War contributes any Thing to the Effects under Consideration. It is often no more than a meer Ceremony. But whether the War be, or be not, declared, the Reasons I have laid down still subsist in all their Force. See further what I have said in the preceding Chapter, § 6. *Note 13.* and § 11. *Note 2.*

2. *Atque ex auctoritate* [legati *Massiliensium*] *haec, &c.* CAESAR, *De Belle civili*, Lib. I. Cap. XXXV.

very hard by any outward Tokens to judge, which is the just Measure of defending ourselves, of recovering our own, or of exacting Punishment, so that it is far better to leave it to the Conscience of the Persons engaged in War to determine these Things among themselves, than to appeal to the Arbitration of others. The ³ *Achaean*s in *Livy* thus addressed the Senate, *How should what had been acted by the Right of War, now come into Debate?* Besides this Permission or Impunity, there is another Effect, *viz.* the Right of appropriating to ourselves what we take in a solemn War, of which we shall treat hereafter.

V. I. But that Licence which a just War gives to an Enemy to hurt another (which we have begun to treat of) extends first to his Person, of which we have many Testimonies in approved Authors. There is a great Saying of ¹ *Euripides*, which had passed into a Proverb amongst the *Greeks*,

V. *Proofs of these Effects.*

Καθαρὸς ἅπας τοὶ πολεμίους ὃς ἂν κτάνῃ.

The Blood of an Enemy doth not stain

The Man who kills him.

Therefore the Custom of the old *Greeks* was, not to wash, drink, much less to perform any Acts of a religious Worship with him that was a Homicide (*that is,* ² *had killed a Man out of War*) but it was lawful to do it with him that in War had slain his Enemy; and frequently to kill

3. *Quonam modo ea, quae belli jure, &c.* Lib. XXXIX. Cap. XXXVI. Num. II.

V. (1) *Ione*, Ver. 1334.

See also Ver. 1046, 1047. PLATO says, that according to an antient Law, founded upon an Oracle at *Delphos*, those, who had killed an Enemy in War, ought not to be looked upon as defiled; no more than if they had killed a Friend without Design in some publick Exercise: About which the Philosopher makes a Law in his imaginary Republick; where he often borrows those already established amongst the *Greeks*. *De Legib. Lib. IX. p. 165. A. B. Vol. I. Edit. H. Steph.*

2. See above, B. I. Chap. II. § 5. with the *Notes* 5 and 7. I find a remarkable Passage on this Subject in ANTIPHON, *Orat. XIV, XV.* The *Greek* Orator says, that the Reason why all Tribunals, which take Cognizance of Murder, judge and pass Sentence in an open Place, is solely, that the Judges may not be in the same Place with the Criminal, whose Hands are polluted with Blood, and that the Accuser also may not be under one Roof with the Murtherer, p. 93. *Edit. Wechel.* See also *Orat. XVI. p. 139.*

is called the Right of War. And *Marcellus* declares in *Livy*,³ *Whatsoever I did among the Enemies, the Right of War defends*. So does *Alcon* to the *Saguntines* in the same Author,⁴ *But I think this is rather to be endured, than that you should be all put to the Sword; and suffer your Wives and Children to be dragged about before your Faces, by the Right of War*. And the same *Livy* in another Place, relating the general Massacre of the *As-tapenses*,⁵ adds, that it was done by the Right of War. And *Cicero* pleads thus for *Deiotarus*,⁶ *But how could he be suspected as your Enemy, who cannot but remember, that when you might have adjudged him to die by the Law of Arms, you made both him and his Son Kings*. And for *Marcellus*,⁷ *For when by the Right of that Victory we might have been all put to Death, we were preserved by your Clemency*. And *Caesar*⁸ tells the *Haedui*, *That he had out of his Mercy preserved them, whom by the Right of War he might have slain*. And *Josephus*⁹ in his *Jewish War*, καλὸν ἐν πολέμῳ θνήσκειν, ἀλλὰ πολέμου νόμῳ, τοῦτ' ἴστιν ὑπὸ τῶν κρατούντων, calls it *honourable to die in War, but by the Right of War, that is by the Hands of the Conqueror*. And so *Statius*,¹⁰ <562>

3. *Quae autem singulis victor aut ademi, aut dedi, quum BELLI JURE, tum excujusque merito satis scio me fecisse*, Lib. XXVI.

4. *Sed haec patienda censeo potiùs, &c.* Idem, Lib. XXI. (Cap. XIII.) Num. 9.

5. *Atque haec tamen hostium iratorum, ac tum maxime dimicantium, JURE BELLI, in armatos repugnantesque edebantur*, Lib. XXVIII. Cap. XXIII. Num. 1.

6. *Tibi porro inimicus cur esset, a quo quum interfici BELLI LEGE, &c.* Cap. IX.

7. *Nam quum, ipsius VICTORIAE conditione, JURE omnes victi occidissemus, &c.* Cap. IV.

8. *CAESAR, nuntiis ad civitatem Aeduorum missis, &c.* Comment. *De bell. Gall.* Lib. VII. (Cap. XLI.)

9. *De bell. Judaic.* (Lib. III. Cap. XXIV. p. 852. B.)

10. (THEBAID. Lib. XII. Ver. 552, 553.) The Grammarian *SERVIVS* observes, that *Priam* complains, not that *Pyrrhus* had killed his Son *Polytes*, as he might do by the Right of War: But that he had made the Father the wretched Spectator of the Son's Death: ME CERNERE] *De spectaculo queritur, non de morte. Quia JURE BELLI Polyten Pyrrhus occiderat: Sed cur ante oculos patris? In Aeneid. II. (Ver. 538.) SPARTIANUS* speaking of the Persons, whom the Emperor *Severus* had caused to be put to Death, distinguishes those who had been killed by the Law of Arms: *Multos praeterea obscuri loci homine interemite, praeter eos, quos jus praelii absumpsit.* In *Vit. Sever.* (Cap. XIV.) *GROTIUS.*

*Non querimur caesos, haec bellica jura, vicésque
Armorum* ———

*We grieve not for our Men, who bravely dy'd,
This is the Right of War, we're satisfy'd.*

2. Yet we must observe, that when these Authors write thus, they do not mean a Permission that renders the Action of killing the Enemy entirely innocent, but an Impunity, such as I have described, as appears from other Places. *Tacitus*¹¹ said, *In Time of Peace every one is treated according to his Desert, but in War the Guilty and Innocent fall alike.* And in another Place,¹² *Neither would the common Right of Men permit them to reward so unnatural a Murder, nor the Law of Arms to punish it.* Neither is the Right of War to be otherwise taken, where *Livy*¹³ mentions, that the *Greeks* spared *Aeneas*, and *Antenor*, because they had been always for Peace. And *Seneca* in his Tragedy of *Troas*.

Quodcunque libuit facere, victori licet.

The Victor's Will is an assured Law.

And in his Epistles,¹⁴ *Those Things, which would be punished with Death, had they been done in secret and by private Authority, are commended, when done by Generals of Armies.* And *St. Cyprian*,¹⁵ *It is a Crime when a private Person is guilty of Homicide, but when it is done by publick Authority it is called a Vertue; Crimes acquire the Right of Impunity, not be-*

11. *Nam in pace causas & merita spectari, &c.* *Annal. Lib. I. Cap. XLVIII. Num. 3.*

12. *Celeberrimos auctores habeo, tantam victoribus adversus fas nefasque irreverentiam fuisse, ut gregarius eques, occisum a se proxima acie fratrem professus, praemium a ducibus petierit. Nec illis aut honorare eam caedem, jus hominum; aut ulcisci, ratio belli permittebat.* *Hist. Lib. III. Cap. LI. Num. 1, 2.*

13. *Jam primum omnium satis constat, Troja capta, in ceteros saevitum esse Trojanos, duobus Aenea Antenoreque, & vetusti jure hospitii, & quia pacis, reddendaeque Helenae, semper auctores fuerant, omne JUS BELLII Achivos abstinuisse,* *Lib. I. Cap. I. Num. 3.*

14. *Quae clam commissa capite luerent, eadem, quia paludati fecerunt, laudamus.* *Epist. XCV. (p. 464. Edit. Gron. Var.)* See what is said above, *B. II. Chap. I. § 1. Num. 3. GROTIUS.*

15. *Madet orbis mutuo sanguine, &c.* *Epist. II. Edit. Pamel. or Lib. Ad Donatum, de gratia Dei, p. 5 and 7. Edit. Fell. Brem.*

cause they do but little hurt, but because the Cruelty of them is carried to a great Excess. And a little farther, the Laws connive at Sin, and that is esteemed lawful, which is authorised by the State. Thus Lactantius says,¹⁶ that the Romans did lawfully injure others; and in the same Sense Lucan,¹⁷ Crimes were authorised.

VI. All that are found among Enemies may be killed or hurt.

^a Liv. l. 38. c. 48. See above, ch. 2. of this book, § 2. n. 2.

^b Ch. 2. of this Book, § 7. n. 2.

^c Ad Leg. V. Dig. De Justitia.

VI. But this Right of Licence is of a large Extent, for it reaches not only those who are actually in Arms, and the Subjects of the Prince engaged in War, but also all those who reside within his Territories; as may appear from that form in Livy. ^a Let him, and all that live within his Country, be our Enemies. And no wonder, since we may apprehend Damage from them, which in a general and uninterrupted War is enough to justify the Right here spoken of, otherwise than in Reprisals, which, as I have said, [[b]] were first introduced after the manner of Taxes laid for the Payment of publick Debts. Wherefore we are not to be surprised, if, as Baldus ^c observes, this Licence in War be much greater, than that in Reprisals. And without doubt Strangers, that come into an Enemy's Country after a War is proclaimed, and begun, are liable to be treated as Enemies.

VII. What if they came thither before the War.

VII. But they who went thither before the War, are by the Law of Nations allowed ¹ a reasonable Time to depart, which if they do not make ² <563> Use of they are accounted Enemies. For thus the Corcyreans,

16. *Quantum autem, &c.* Instit. Divin. Lib. V: Cap. IX. Num. 4. Edit. Cellar.

17. Jusque datum sceleri canimus ———
Pharsal. Lib. I. Ver. 2.

VII. (1) See BEMBO, *Hist.* Lib. I. CICERO justifies *Ligarius* for this Reason, that being in *Africa* before the Civil War, it was not in his Power to leave it when it broke out suddenly: [*Tertium est tempus, quo post adventum Vari in Africa restitit Ligarius; quod si est criminis, necessitatis crimen est, non voluntatis. An ille, si potuisset illinc ullo modo evadere, Uticæ potius, quam Romæ; cum P. Attio, quam cum concordissimis fratribus; cum alienis esse, quam cum suis, maluisset?* Orat. pro Ligar. Cap. II.] The Roman Consuls, when they went to besiege *Capua*, had Orders to declare first to the *Campanians* within it, that if they thought fit, they might quit the Place with all their Effects: *Consulibus literæ a P. Cornelio prætoze missæ, Ut prius quam clauderent Capuam operibus, &c.* LIVY, Lib. XXV. (Cap. XXII. Num. 12.) GROTIUS.

2. The late Mr. COCCEIUS, in a Dissertation which I have already cited, *De jure Belli in amicos*, § 23. rejects this Distinction, and is of Opinion, that even Strangers,

before they laid Siege to *Epidamnus*, gave Notice to all ³ Strangers to depart, or else they should be reputed Enemies.

VIII. I. But such as are really Subjects of the Enemy, that is, ¹ from a permanent Cause, if we respect only their Persons, may in all Places be assaulted; because when War is proclaimed against a Nation, it is at the same Time proclaimed against all of that Nation, as we have shewn ^a above, in the Form of Denunciation. So in the Decree against King *Philip*, *They did will and command, that War should be denounced against him, and the Macedonians under his Dominion*. And he that is an Enemy may by the Law of Nations, be assaulted every where; according to *Eu-ripides*, ²

Νόμος γὰρ ἐχθρὸν δρᾶν ὅπου λάβῃς κακῶς.

Assault your Enemy where'er you find him.

VIII. *The Subjects of Enemies are every where to be attacked, unless in the Territories of a neutral State.*

^a *Ch. 3. of this Book, § 9.*

to whom some small Time to retire has not been given, should be deemed of the Enemy's Party, and thereby liable to just Acts of Hostility. He himself afterwards distinguishes, to supply this pretended Defect, between Strangers, who continue in a country, and those, who only pass thro' it, or if they make any stay, are obliged to do so either by Sickness, or the Necessity of their Affairs. But even this shews, that Mr. COCCEIUS here, as well as in many other Places, has censured our Author without understanding him. In the following Paragraph, GROTIUS evidently distinguishes, from the Strangers he speaks of just before, those, who are the Enemy's *Subjects* from a *permanent Cause*; by which without doubt he means, as the learned GRONOVIVS explains it, those who are settled in the Country. Our Author explains himself upon this Head, in *Chap. II. of this Book, § 7. Num. 2.* where he speaks of Reprisals, which he even grants against this kind of Strangers; whereas he does not admit them against *those who only pass thro', or stay some short Time in the Country*. So that here is the precise Distinction, which the Critick gives for new.

3. They extended this Permission to the People of the City, as well as Strangers. THUCYD. *Lib. I. Cap. XXVI.* See another Example in the same Historian, *Lib. IV. Cap. XV.* where a Term of five Days is granted them to depart.

VIII. (i) See above, *Chap. II. of this Book, § 7. Num. 2.* and *Note 2.* upon the preceding Paragraph of this *Chap. IV.*

2. This is a Fragment of a Tragedy of that Poet's, which is not named by the Writer, who has preserved it: It is in *p. 429.* of our Author's *Excerpta*, and the 363d Verse of Mr. BARNES's Collection; neither of them mention the Author from whom they take it.

And in *Marcian* the Lawyer, ³ *Deserters, where-ever they are found, may be killed as Enemies.*

2. They may then lawfully be killed in their own Country, in the Enemies Country, in a Country that belongs to no Body, or on the Sea. But that we may not kill or hurt them in a neutral Country, proceeds not from any Privilege attached to their Persons, ⁴ but from the Right of that Prince in whose Dominions they are. For all civil Societies may ordain, that no Violence be offered to any in their Territories, but by proceeding in a judicial Way, as we have proved ^b out of *Euripides*,

^b *B. 2. ch. 21.*
§ 6. n. 1.

*If you can charge these Guests with an Offence,
Do it by Law; forbear all Violence.*

But ⁵ in Courts of Justice, the Merit of the Person is considered, and this promiscuous Licence of hurting each other ceases, which I have said was granted among Enemies in Time of War. ⁶ *Livy* relates that seven *Carthaginian Gallies* ^c rode in <564> a Port belonging to *Syphax*, who at that Time was in Peace both with the *Carthaginians* and *Romans*, and that *Scipio* came that way with two ^d Gallies; these might have been seized by the *Carthaginians* before they had entered the Port, but being forced by a strong Wind into the Harbour, before the *Carthaginians* could weigh Anchor, they durst not assault them in the King's Haven.

^c *Triremes,*
with three Oars
on each Side.

^d *Having five*
Oars on each
Side and not
three, as our
Author says here.

3. *Transfugas licet, ubicumque inventi, &c.* Digest, *Lib. XLVIII. Tit. VIII. Ad Leg. Cornel. de Sicariis, &c. Leg. III. § 6.*

4. See what we shall say below, *Chap. VI. § 26.* and ALBERICUS GENTILIS, *Hispanic. Advocation. Lib. I. Cap. VI.* as also PAULUS MATTHIAS WECHNER, *Consil. Francic. XCII.* GROTIUS.

5. Add, that the Sovereign of the Country, by continuing Neuter has tacitly engaged not to permit Acts of Hostility to be committed on either Side in his Dominions.

6. *Ipse [Scipio] cum C. Laelio, &c. Lib. XXVIII. (Cap. XVII. Num. 12. & seqq.)* There are other Examples in History of the like Nature. The *Venetians* hindered the *Greeks* from attacking the *Turks* in one of their Ports. CHALCOCONDYL. *Lib. IX.* See what was done at *Tunis* in regard to the *Venetians* and *Turks* in BEMBO, *Lib. IV.* and in *Sicily*, relating to the *Pisans* and *Genoese*. In BIZARO, *De bell. Pisan.* See also PAULINUS, *Goth.* in regard to *Rostoch* and *Gripswald.* GROTIUS.

IX. 1. But to return to the Point in Hand, how far this Licence extends itself, will hence appear, in that the Slaughter of Infants and Women is allowed, and included by the Right of War. I will not to this refer the slaying of the Women and Children of *Heshbon* by the *Hebrews*, Deut. ii. 34. nor that they were commanded to do the like to the *Canaanites*, Deut. xx. 16. and other Nations¹ who were in the same Case² with them. It was the special Act of GOD, whose Right over Men is far greater, than that of Men over Beasts, as we have^c proved elsewhere. That which is more proper to testify the common Custom of Nations, is that of the Psalmist, *Psal. cxxxvii. 9. Blessed shall he be, that taketh and dasheth thy little ones against the Stones.* Like to that of *Homer*,³

Καὶ νήπια τέκνα
Βαλλόμενα προτὶ ἄστυ ἐν αἰνῇ δηϊότητι
When bloody Wars a wretched Land infest,
The harmless Infants suffer with the rest.

2. The *Thracians* of old having taken the City *Mycalessus*, put Women and Children to the Sword, as *Thucydides*^f informs us. *Arian*^g relates the same of the *Macedonians*, when they took *Thebes*; and so did the *Romans* at *Ilurgis* a City of *Spain*; ἔκτειναν ὁμαλῶς καὶ παιδιὰ καὶ

IX. This Right of hurting extends to Women and Children.

^c B. 2. ch. 21. § 14.

^f Lib. 7. c. 29.

^g De Exped. Alexand. l. 1. c. 8. in fn.

IX. (1) *Quorum connexa cum Cananaeis erat caussa*, says our Author: That is to say, whom the Divine Vengeance had condemned to be utterly extirpated, as well as the seven Nations of the *Canaanites*. Such were the *Midianites*, NUMBERS xxi. 2. the *Amalekites*, EXODUS xvii. 14.

2. JOSEPHUS speaking of the *Amalekites* says, that King *Saul* caused them all to be put to the Sword, without sparing either Women or Children. [See I *Samuel* xv. 3.] not believing, adds he, that he acted too cruelly in that respect; first because they were Enemies whom he treated in that manner, and next because what he did was by the Order of GOD, which he could not disobey without Danger. *Antiq. Jud.* Lib. VI. Cap. VIII. GROTIUS.

3. *Iliad.* Lib. XXII. Ver. 61. The Emperor *Severus*, ordering his Soldiers to put all to the Sword in *Britain*, used some other Verses of HOMER, in which *Agamemnon* says, that none of the *Trojans* should be saved, not even the Children in their Mother's Wombs:

——— Τῶν [τρώων] μήτις, &c.

[*Iliad.* Lib. VI. Ver. 57. & seqq. See XIIPHILINUS, *Vit. Sever.* p. 342. Edit. H. Stephens.] GROTIUS.

γυναικάς, *They slew Women and Children without Distinction*, which are the Words of ^h *Appian*. *Germanicus Caesar* is reported by ⁴ *Tacitus*, to have wasted the Villages of the *Marsi*, (a People of *Germany*) with Fire and Sword; adding, *Neither Sex nor Age found any Pity*. And the Emperor *Titus* ⁵ exposed the Women and Children of the *Jews* to be devoured by wild Beasts in the publick Shews; and yet these two Princes were never esteemed to be of a cruel Nature: Whence it appears how much that Inhumanity was turned into <565> Custom. No wonder then if old Men were also killed, as *Priam* by *Pyrrhus*. *Aeneid*. ii. 550. & seq.

X. *Yea, and to Captives, and that at any Time.*

X. I. Neither were Prisoners exempted from this Licence [[¹]]; *Pyrrhus* in *Seneca*, according to the Custom at that Time, pleads thus:

4. *Non sexus, non aetas, miserationem adtulit*. *Annal*. *Lib*. I. *Cap*. LI. *Num*. 2. *Scipio* did the same at the taking of *Numantia*. The Emperor *Julian*'s Soldiers killed the Women of the City of *Dacira*, whom the Men had left in it; as *ZOSIMUS* tells us, *Lib*. III. (*Cap*. XV. *Edit*. *Cellar*.) The same Emperor, when he took the City of *Majozamalcha* in the Country of *Babylon*, spared neither Sex nor Age: *Et sine sexûs discrimine vel aetatis, &c*. *AMMIAN*. *MARCELLIN*. *Lib*. XXIV. (*Cap*. IV. p. 436. *Edit*. *Vales*. *Gron*.) *GROTIUS*.

Our Author gives us no Authority for what he says of *Scipio*: And indeed in all Appearance he had none to give, but that of an unfaithful Memory. We find nothing like it in the Historians, who have writ of the War and taking of *Numantia*. *Scipio*, far from having put the Women and Children to the Sword, as *APPIANUS ALEXANDRINUS* expressly says, kept only fifty of the *Numantines*, after the City surrendered, for his Triumph; all the rest were sold. *De Bell*. *Hispan*. p. 532. *Edit*. *Amstel*. (3II. *H*. *Steph*.)

5. I find nothing in *JOSEPHUS*, from whence it can be so much as inferred that *Titus* made the *Jewish* Women and Children encounter wild Beasts. On the contrary, that Historian says, after the taking of *Jerusalem*, *Titus* caused all those to be sold, that were under seventeen Years of Age. *De Bell*. *Jud*. *Lib*. VII. *Cap*. XVI. in *Lat*. (XLV. in *Graec*.) p. 968. C. Our Author has copied this from *ALBERICUS GENTILIS*, *De Jure Belli*, *Lib*. II. *Cap*. XXI. p. 425. But the latter alledges no Authority except *CARDAN*'s, a very inaccurate Author, who declaims on that Head against *Titus* in his *Encomium Neronis*. The Words of the latter are *Pergamus ergo ad illas humani generis delicias, Titum, Neronique comparemus, qui uno spectaculo aliquot millia Judaeorum, in quibus pueri & mulieres, fêris dilaniandos exposuit. Auctor illius amicus JOSEPHUS: Ne quicquam ex fide decedere credas*, Vol. I. p. 205. *Opp*. *Edit*. *Ludg*. 1663.

X. [[Footnote number missing in text, supplied from Latin edition.]] (I) *JOSEPHUS* speaking of the King of *Syria*'s People, who came to take *Elisha*, and having been struck with a miraculous Blindness saw themselves in the midst of *Samaria*; says, that

² *Lex nulla capto parcit, aut poenam impedit.*

*No Law commands to spare the captive Slave,
Or does forbid to punish him.*

In the *Ciris* of *Virgil*, this Licence is called *the Law of War*, and that even with respect to captive Women; for thus argues *Scylla*:

³ *At belli saltem captivam lege necâsses*

By Law of Arms your Captive you might kill.

The Passage of *Seneca* just mentioned speaks of a Woman, namely *Polyxena*, who was to be killed. *Horace* advises,

⁴ *Vendere cum possis captivum, occidere noli.*

Forbear to kill the Captive, thou canst sell. Creech.

For he supposes it lawful to kill him. And *Donatus* derives the Word *Servus* (a Slave) from a Verb that signifies to preserve, ⁵ *Because*, says he, *a Slave is a Person whose Life is preserved, which by the Right of War ought to have been taken away. Ought*, is an improper Expression, for *it was lawful*: So the Prisoners taken at *Epidamnus* were killed by the *Corcy-*

King *Joram*, having asked the Prophet, whether he should put them to Death, that holy Man replied in the Negative, because it was lawful to kill none but Prisoners of War. (*Antiq. Jud. Lib. IX. Cap. II. p. 303. D.*) *VIRGIL* introduces such a Prisoner begging his Life of *Aeneas*:

*Per patrios manes, per spes surgentis luli,
Te precor, hanc animam serves natoque patrique*

By young *Iulus*, by thy Father's Shade,

*O spare my Life, and send me back to see,
My longing Sire, and tender Progeny!* DRYD.

Aeneid. Lib. X. Ver. 524, 525. The Emperor *Otho* caused 70,000 *Sclavonians* to be put to Death, whom he had taken Prisoners, as *WITHIKIND* informs us, *Annal. Lib. II. GROTIVS.*

2. *Troad. Ver. 333.*

3. *Ver. 446.*

4. *Lib. I. Epist. 69.*

5. *SERVI* [dicuntur] *qui servati sunt, quum eos occidi oporteret jure belli.* In *TERENT. Adelphi, Act. II Scen. I. Ver. 28.*

^a L. I. c. 30. *reans*, as *Thucydides* ^a relates, and 5000 Prisoners by ^b *Hannibal*. ⁶ And in *Hirtius*, a *Caesarean* Captain in the *African* War thus addresses *Scipio*, ^b *Appian*. *Hannibal*. *Bell.* p. 556. ⁷ *I return you Thanks, that you have been pleased to engage your Word for my Life and Safety, being Prisoner by the Right of War.*

2. Nor is this Licence of killing our Captives confined to any Time, by the Right of Nations, but it is restrained more or less in some Places, by the particular Laws of each State.

XI. *Yea, even such as are willing to yield, if not accepted of.* XI. We meet also with many Examples of Suppliants that have been slain, as by *Achilles* in ¹ *Homer*, of *Mago*, and *Turnus* in ² *Virgil*; which are not only recorded, but also justified by the Right of War. *St. Augustine* commending the *Goths*, for sparing Suppliants, and those that had fled for Refuge to Churches, acknowledges, ³ *That which by the Right of War they might do, they thought unlawful for them to do.* Neither are they always received to Mercy, that beg it; witness <566> the *Greeks* ⁴ who served the *Persians* at the Battle of the *Granicus*. And the *Uspenses* in *Tacitus* ⁵ begging Quarter, *which* (he says) *the Conquerors denied, but let them die by the Law of Arms.* Observe here also the Right of War confessed by that Author.

6. *Et a M. Bruto non pauci.* And *M. Brutus* also put many to Death. These Words, which were in the first, have disappeared, I know not how, in all the subsequent Editions; tho' the Citation from *DION CASSIUS*, *Lib. XLVII.* where the Fact is, p. 405. *D.* is continued in the Margin. They could not have been struck out designedly by our Author, who had no Reason to retrench a Fact well applied.

7. *Pro tuo*, inquit, *summo beneficio*, *Scipio*, &c. *De bell. Afric.* Cap. XLV.

XI. (1) See the *ILIAD.* *Lib. XX.* *Ver.* 463. & seqq. *Lib. XXI.* *Ver.* 73. & seqq.

2. The Passage, that regards *Mago*, has been given in *Note 1.* on the foregoing Paragraph. That in Relation to *Turnus* is in *Aeneid.* XII. 930. & seqq.

3. *Quod alibi jure belli licuisset, &c.* *De Civit. Dei, Lib. I. Cap. I.*

4. Our Author cites Nobody here, and would, I believe, have found it very difficult to have alledged any Authority for this Fact, with which his Memory supplied him. *Alexander the Great's* Historians say nothing like it. That Conqueror sent the *Greeks* that were taken at the Battle of the *Granicus* into *Macedonia* to work as Galley-Slaves. See *ARRIAN, De expedit. Alexandr.* *Lib. I. Cap. XVII.* and at the End of this Book.

5. *Postero [die] misère legatos [Uspenses]—quod adspernati sunt victores, quia trucidare deditos saevum, tantam multitudinem custodia cingere arduum: Ut belli potius Jure caderent.* *Annal. Lib. XII. Cap. XVII. Num. 1, 2.*

XII. Neither do they always find Mercy, that ^a surrender without any Condition, but are often slain, as the Princes of *Pometia* ¹ by the *Romans*, the *Samnites* ² by *Sylla*, the ^b *Numidians*, and ^c *Vercingetorix* by *Caesar*. Nay, it was almost the constant ³ Custom of the *Romans* on the Days of their Triumph to put to Death the Commanders of the Enemies, as *Cicero* tells us in his fifth Oration against *Verres*. *Livy* in his 28th Book, and elsewhere. *Tacitus* in his 12th *Annal*, and many others. And the same *Tacitus* informs us, that *Galba* ⁴ caused the tenth Man to be killed of those, whom upon Submission he had received to Mercy; and *Caecina* upon the Surrender of *Aventicum*, caused *Julius Alpinus* to be slain, as the chief Promoter of the War; he left the rest to either the Mercy, or Cruelty of *Vitellius*.

XII. *Yea, and to such as yield without Conditions.*

^a See *Thuan.* l. 70. in fin. in the *Affairs of Ireland, at the Year 1580.*

^b *Dion Cassius.* l. 43. p. 245. Edit. H. Stephens.

^c *Idem,* l. 40. p. 156.

XII. (1) Or rather the principal Persons of the *Aurunci*, to whose Party this *Latin* Colony had gone over. *LIVY*, who relates this Action, condemns it at the same Time: *Ceterum nihilo minus foedè, dedita urbe, quam si capta foret, Aurunci passim principes securi percussi; sub corona vaenierant coloni alii, &c.* Lib. II. Cap. XVII. Num. 6.

2. I find nothing of this Kind in Relation to the *Samnites*, either in *PLUTARCH* or *APPIANUS ALEXANDRINUS*. Our Author has followed *ALBERICUS GENTILIS* in this Place, without examining his Authority, *De Jure Belli*, Lib. II. Cap. XVII. p. 364. This appears from his citing, as he does, *DION.* Lib. XLV. instead of XLIII. a Citation that relates to the Example of the *Numidians*, and not as our Author thought, to that of the *Samnites*, for which the Civilian, whom he copies, quotes no Writer. The latter probably had in his Thoughts, what *Sylla* did to the People of *Antemna*, a City of the *Sabines*, but not without notorious Perfidy, since he had promised them their Lives. *PLUTARCH, in Vit. Syll.* p. 471. D. Vol. I. Edit. Wechel. So that the Example is misapplied.

3. See *CICERO, Lib. V.* in *Verr.* (Cap. XXX.) *LIVY, Lib. XXVI.* (Cap. XIII. Num. 14.) and elsewhere: *TACITUS, Annal.* Lib. XII. (Cap. XIX. Num. 3.) There is an Example of the same Kind in the Chronicle of *REGINON*, upon the Year 905. *GROTIUS.*

4. *Galba* upon making his Entrance into *Rome*, ordered those who had surrendered to him to be decimated: *Horror animum subit, quoties recordeo feralem introitum, & hanc solam Galbae victoriam, quum in oculis Urbis decimari deditos jubenet, quos deprecantis in fidem acceperat.* *TACIT. Hist.* Lib. I. (Cap. XXXVII. Num. 3.) *Quumque, direptis omnibus, Aventicum, gentis caput, &c.* *Ibid. Cap. LXVIII. Num. 5, 6.* *GROTIUS.*

XIII. *This Right not to be referred to any other Cause, as Retaliation, Obstancy of Defence, &c.*

^a Chalcocondylas, l. 8.

^b B. 2. c. 21.

XIII. I. ^a Historians sometimes set down the Reason of this Cruelty, of the Enemies, especially to Captives, and Suppliants, as either by way of Retaliation, or because of an obstinate Defence. But these are rather Motives, than justifying Causes, as I have distinguished in another Place. For just Retaliation (properly so called) is to be executed only upon the Person of the Offender (as has been already said, ^b when we treated of the Communication of Punishment.) But on the contrary, in War this Right of Retaliation is often exercised upon the Innocent. This Custom is thus described by ¹ *Diodorus Siculus*, *The Chance of War being equal on both Sides, neither Party can be ignorant, that if they be vanquished, they must suffer the same themselves, which they intend to their Enemies.* And in the same Author, *Philomelus the Phocian General, Diverted the Enemies from an insolent and cruel Revenge, by treating in the same manner such of them as fell into his Hands.*

2. But there is no Man will judge an obstinate Adherence to our Party punishable, as the ² *Neapolitans* alledged to *Belisarius* in *Procopius*; especially if we were engaged therein either by a natural Obligation, or by an honest and deliberate Choice. It is so far from being a Crime, that on the contrary it is reckoned one if <567> a Man quits his Post, especially by the Laws of the antient *Roman* Discipline; for in this Case they rarely allowed any Excuse, were the Fear or Danger never so great. ³ *Livy* says, *to desert a Post was capital among the Romans.* Every one therefore may use this Rigour to his own Advantage, and this Rigour is justified before Men, by that Right of Nations, which we now treat of.

XIII. (1) (*Lib. XIV. Cap. XLVII. p. 421.* Edit. H. Steph.) The other Passage is in *Lib. XVI. Cap. XXXI. p. 526.* See also what the same Historian says in the *Excerpta* of Mr. PEIRESKIUS, in regard to *Spondius*, and *Amilcar Barca*, (p. 277.) GROTIUS.

2. It was not the *Neapolitans*, who made this Answer to *Belisarius*, but two Advocates, *Pastor* and *Asclepiodotus*, speak thus to the *Goths* and *Neapolitans*, *Lib. I. Gotthic. Cap. VIII.* Our Author has again in this Place relied upon ALBERICUS GENTILIS who expresses himself precisely in these Terms, *Lib. II. De jure Belli, Cap. XVI. p. 345, 346.*

3. *Praesidio decedere, apud Romanos, capital esse.* LIVY, *Lib. XXIV. (Cap. XXXVII. Num. 9.)* See also POLYBIUS, *Lib. I. (Cap. XVII.)* and *Lib. VI. (Cap. XXXV.)* GROTIUS.

XIV. This Right also reaches to Hostages, nor to them only, who freely give themselves as Pledges by a Sort of Agreement, but also those who are delivered up by others. 250 Hostages were slain by the ^a *Thessalians*, and 300 of the *Volsci Aurunci* by the ^b *Romans*. And we must observe, that sometimes Children were given as Hostages, as we may learn from the ¹ *Parthians*, and from ^c *Simon Macchabaeus*, and sometimes Women, as by the *Romans* ^d in the Time of *Porsena*, and by the ² *Germans* in *Tacitus*.

XIV. *It extends also to Hostages.*

^a *Plut. De Virt. Mulier.*

^b *Dion. Halicarn. l. 6 c. 30.*

^c *1 Mac. xiii. 16.*

^d *In the famous Story of Clelia, Liv. l. 2. c. 13.*

XIV. (1) TACITUS, whom our Author cites here in the Margin, speaks only of the Children of Kings in general, without saying whether young or not: *Ideo Regum obsides liberos dari* [a Parthis] &c. *Annal. Lib. XII. Cap. X. Num. 5.* He says elsewhere, *partem prolis*, *Lib. II. Cap. I. Num. 2.* In the Passage of the MACCABEES, there is only *υιούς*. However as the Term is general; nothing hinders its including young Children, whom their tender Age and Innocence might render more dear to their Parents, and thereby more proper to serve as Sureties to those, who demanded or received them for Hostages. This may be inferred almost with certainty from a Passage in STRABO, quoted by JUSTUS LIPSIVS: For we find there, that *Phraates* King of *Parthia* gives *Titius*, Governour of *Syria* for the *Romans*, four of his legitimate Sons as Hostages, with two of their Wives, and four of their Sons. *Geograph. Lib. XVI. p. 1085, 1086. Edit. Amstel. (748. Edit. Casaub. Par.)* For in this Number there must have been some Children very young. But the following are express Authorities. Suetonius informs us, that *Caligula* in one of his ridiculous Diversions, placed himself upon a Chariot in the Habit of a Coachman, and set an Infant, named *Darius*, before him, who was an Hostage of the *Parthians*: *Postridie quadrigario habitu, curriculoque bijugi famosorum equorum, prae se ferens Darium Puerum, ex Parthorum obsidibus, &c. Vit. Caligal. Cap. XIX.* The same Historian speaks elsewhere of certain Hostages, probably given by some People of *Germany*, whom *Caligula* ordered to be taken from School: *Rursus obsides quosdam abductos e literario ludo, &c. Cap. XLV.* But it is also known that the famous *Clelia*, having the Choice amongst all the Hostages given with her by the *Romans*, obtained Liberty for those, who were not arrived at the Years of Puberty: *Productis omnibus eligisse IMPUBERES dicitur, &c. Livy, Lib. II. Cap. XIII. Num. 10.*

2. Our Author cites here the fourth Book of TACITUS's *History* in the Margin, where I find nothing to this Effect. The Passage is in the Description of *Germany*, where the Historian says, that those People believed themselves more strongly obliged, when they gave Maids of illustrious Birth as Hostages: *Adeo ut efficacius obligentur animi Civitatum, quibus inter obsides puellae quoque nobiles imperantur*, *Cap. VIII. Num. 2.* He adds, that the *Germans* imagined most Women to have a Spirit of Prophecy: And as he speaks also of this in the fourth Book of his *History*, *Cap. I. XI. Num. 4.* that probably made our Author confound the two Passages in his Memory.

XV. *By the Law of Nations it is forbidden to kill any by Poison.*

XV. 1. As the Law of Nations permits many Things, in the Sense we have explained, which are forbid by the Law of Nature, so it prohibits some Things allowed by this Law of Nature. For if we respect the Law of Nature, when it is permitted to kill a Man, it signifies not much, whether we do it by the Sword or Poison. I say the Law of Nature, for indeed, it is more generous to attempt another Man's Life in such a manner, as to give him an Opportunity of defending himself, but we are under no Obligation to use such Generosity towards those who deserve to die. But the Law of Nations, if not of all, yet of the more civilized, allows not the taking the Life of an Enemy, by Poison; which Custom ¹ was established for a general Benefit, lest Dangers should be increased too much, since Wars were become so frequent. And it is probable, that it was first introduced by Kings. For if their Life be more secure, than that of others, when attacked only by Arms; it is, on the other Hand, more in danger of Poison, unless protected by a regard to some Sort of Law, ² and the fear of Disgrace and Infamy. <568>

2. *Livy* speaking of *Perseus*, ³ calls it a clandestine *Villany*. *Claudian* of the Offer of *Pyrrhus*'s Physician to poison him rejected by *Fabricius*,

XV. (1) Without this general Consent, which it is more easy to suppose, than prove; it suffices to say, that, it being the Custom among Nations at Variance with us, not to make Use of Poison against an Enemy, we are supposed to comply with it, when on beginning a War, we do not declare, that we are at Liberty to act otherwise, and leave it to the Enemy's Option to do the same. This tacit and particular Convention is so much the more real, as Humanity, and the Interest of both Parties, equally require it; since Wars are so frequent, and often undertaken upon so slight Occasions, especially since the Mind of Man, ingenious in inventing Means to do hurt, has so much multiplied those, which are authorised by Custom, and considered as honest. See upon this Head Mr. GRIBNER, Professor at *Wittemburg*, in his *Principia Jurisprudentiae Naturalis*, Lib. III. Cap. IX. § 3.

2. The Senators, or rather the Consuls, *C. Fabricius*, and *Q. Aemilius*, in the Letter they wrote to inform *Pyrrhus*, that one of his People had offered to poison him, say, that it was not for his sake they gave him that Information, but that they might not incur the Infamy of having caused him to be destroyed in that Manner. [PLUTARCH, in *Vit. Pyrrh.* p. 396. C. Vol. I. *Edit. Wechel.*] GROTIUS.

3. *Haec ad ea, quae ab Eumene delata erant, accessire, quo maturius hostis Perseus judicaretur. Quippe, quem non justum modo adparare bellum regio animo, sed per omnia CLANDESTINA grassari SCELERA latrocinatorum ac VENERIFICIUM cernebant.* Lib. XLII Cap. XVIII. Num. 1.

⁴ calls it an abominable Action; and *Cicero* ⁵ hinting at the same Story terms it a Crime. It concerns the common Interest of Nations, that no such Examples be given, ⁶ say the *Roman* Consuls, in their Letter to *Pyrrhus*, which *Gellius* recites out of *Cl. Quadrigarius*; and *Val. Maximus* ⁷ observes, *Wars should be waged by Arms, not by Poison*. And *Tacitus* ⁸ relates, that when the Prince of the *Catti* offered to poison *Arminius*, *Tiberius* refused it, imitating by that glorious Action the Conduct of antient Generals. Wherefore ^a they that hold it lawful to poison an Enemy (as *Baldus* ⁹ did upon the Authority of *Vegetius*) do regard the mere Law of Nature, but over-look that Law which is established by the Consent of Nations.

^a See Bemb. Hist. l. 2. in fin.

XVI. I. Somewhat different from this manner of poisoning (as having something of open Force in it) is to poison the Heads of Darts, and thereby force Death a double way, which *Ovid* says ¹ was much practised

XVI. Or to empoison Waters or Weapons.

4. ——— *Bellumque negavit* [Fabricius]
Per famuli patrare NEFAS. ———
De Bell. Gildonic. Ver. 273, 274.

5. *Sed magnum dedecus & flagitium, quicum laudis certamen fuisset, cum non virtute, sed SCELERE superatum.* De Offic. Lib. III. Cap. XXII.

6. *Sed communis exempli & fidei ergo visum est, uti te salvum velimus; ut esset, quem armis vincere possemus.* EX CLAUD. QUADRIGAR. Noct. Attic. Lib. III. Cap. VIII.

7. *Et [memor Senatus] armis bella, non venenis, geri debere.* Lib. VI. Cap. V. Num. 1.

8. The Passage has been recited above, *Chap. I. § 20. Note 21.*

9. That Lawyer would, I believe, have found it very difficult to point out the Passage of *VEGETIUS*, where he pretends to have read this: AS *ALBERICUS GENTILIS* has already observed, *De Jure Belli*, Lib. II. Cap. VI. p. 256.

XVI. (i) They made use of the Gall of Vipers. *OVID*, who tells us this, calls it giving Death two Ways with one Wound:

*Qui mortis saevo gement ut vulnere caussas,
 Omnia vipereo spicula felle linunt.*

De Ponto, Lib. I. Eleg. II. Ver. 17, 18. *PLINY* says of the *Scythians*, that they rubbed their Darts with human Blood, and the Gore of Vipers: *SCYTHAE sagittas tingunt viperina sanie, & humano sanguine, irremediabile id scelus, mortem illico adfert levi tactu.* *PLINY*, *Hist. Natur.* Lib. XI. Cap. LIII. See *HELMOLDUS*'s Supplement, where he says something like this of the *Servians*, *Chap. IV. GROTIUS*.

by the *Getes*,² *Lucan* by the *Parthians*, and *Silius* by some of the³ *Africans*, and *Claudian* particularly by the⁴ *Ethiopian*s. But this also is⁵ contrary to the Law of Nations, tho' not of all, yet of the *European*, and others civilized like them, which is rightly observed by *Johannes Salisberiensis*,⁶ whose Words are these: *Neither do I find the Use of Poison allowed by any Law, tho' sometimes practised among Infidels*. Therefore *Silius* calls it,⁷ *to render Arms infamous by Poison*.

2. So also the empoisoning of Springs (which cannot be concealed, or at least not long) *Florus* declares to be contrary not only to the Custom of the antient *Romans*, but also to⁸ the Laws of the Gods; for the Antients frequently ascribed to the Divinity the Rules of the Law of Nations, as I have elsewhere observed; neither should it seem strange, that

2. *Spicula nec solo spargunt [Parthi] fidentia ferro
Stridula sed multo saturantur tela veneno.
Pharsal. Lib. VIII. Ver. 303, 304.*

3. The *Nubians*:

*Tempora multiplici mos est [Nubis] defendere lino,
Et lino munire latus, scelerataque succis
Spicula dirigere & ferrum infamare veneno.*

SILIUS ITALIC. *Lib. III. Ver. 271. & seqq.* NICHOLAS HEINSIUS reads *inflammare veneno*.

4. *Sed didicit non Ethiopum geminata venenis
Vulnera ———
In I. Cons. Stilicon. Lib. I. Ver. 350.*

5. Therefore *Ilus Mermerides* denies Poison to *Ulysses* for his Darts.

Ἐπεὶ ῥα θεοῦς νεμεσίζετο αἰὲν ἕοντας.

He justly dreaded the immortal Gods.

Odys. Lib. I. (Ver. 263.) GROTIIUS.

6. *Nec Veneni, licet videam ab Infidelibus, &c.* Polycratic. *Lib. VIII. Cap. XX. p. 653.*

7. In the Verses quoted above, *Note 3.* upon this Paragraph.

8. Where he speaks of a *Roman* General, who had poisoned the Springs, to oblige some Cities to surrender: *AQUILIUS Asiatici belli reliquias confecit, mixtis (nefas!) veneno fontibus ad deditionem quarundam urbium. Quae res, ut maturam, ita infamem fecit victoriam: Quippe quum CONTRA FAS DEUM, MORESQUE MAJORUM, medicaminibus impuris, in id tempus sacrosancta Romanorum arma violasset.* *Lib. II. Cap. XX. Num. 9. See ult.*

there are such tacit Agreements among Nations, in order to lessen the Dangers that attend Wars, when of old it was agreed between the <569> *Chalcidians* ⁹ and *Eretrians* during the War, *Μὴ χρῆσθαι τηλεβόλοις*, *Not to make use of Darts.*

XVII. But it is not the same, when Waters are ¹ (without Poison) so corrupted, ² that they cannot be drunk, which *Solon*, and the ³ *Amphictyones* approved against the Barbarians. *Oppianus*, of Fishing, declares it was commonly done in his Time; it being, in Effect, the same Thing as if the Current of a River ^a were turned, or ^b *The Veins of a Spring cut off*; which, by the Law of Nature, and the general Consent of Nations, are allowed.

XVII. *But not any other ways to corrupt the Waters.*

^a *Frontin.* l. 3.

^b *Priscus.* in Excerpt. legat.

XVIII. 1. But it is frequently disputed, whether the Law of Nations permits the sending one privately to kill an Enemy. But to explain this, we must distinguish between the Persons sent; whether they violate their Faith, given expressly or tacitly; as Subjects to their Prince, Vassals to

XVIII. *Whether it be against the Law of Nations to employ Assassins, explained.*

9. This the Geographer proves from a Column, upon which in his Time remained the Articles of the Conventions, those People had made with each other in Relation to Acts of Hostility. *Lib. X. p. 688. B. (448. Edit. Paris.)*

XVII. (1) By dead Bodies or Lime; as *Belisarius* did during the Siege of *Auximum* according to *PROCOPIUS, Gothic. Lib. II. (Cap. XXVII.) GROTIUS.*

2. The *Turks* did the same at *Diadibra*, as *NICETAS* tells us in the History of *Alexis*, Brother of *Isaac*, *Lib. I. (Cap. IX.)* See other Examples in *OTHO FRISINGENS.* and the Poet *GUNTHER*, in *Ligurin.* *GROTIUS.*

3. During the Siege of *Cirrha* or *Crissa*, a City of *Phocis*, *Solon* advised the *Amphictyones* to turn off the River *Plithus*, which ran through the City; after which he caused the Roots of Hellebore to be thrown into it, and then ordered the Waters to be brought into their ancient Channel. The People of *Cirrha*, having drank of them, were seized immediately with a Diarrhoea, which obliged them to leave their Walls undefended, so that the Place was taken. This *PAUSANIAS* relates, whom our Author quotes in the Margin, *Lib. X. or Phocic. Cap. XXXVII. p. 356. Edit. Graec. Wechel.* See also *POLYEN. Strategem. Lib. VI. Cap. XIII.* Our Author quotes also in the Margin, besides *FRONTINUS, Strateg. Lib. III. Cap. VII. Num. 6.* the Orator *AESCHYNES, Orat. de male obita Legat.* The Passage he had in his Thoughts, was probably the Article of the Oath of the *Greeks*, by which they engaged not to destroy any City, that sent Members to the Council of the *Amphictyones*, and not to deprive them of the Use of any running Water, either in Time of Peace or War; which implies, that otherwise it might be done against an Enemy. *p. 262. A. Edit. Basil. 1572.*

their Lord, Soldiers to their General, Suppliants, Strangers, or Deserters to them that have entertained them; or whether the Person sent owe no Faith to him against whom he is employed. Thus *Pepin* Father of ¹ *Charlemagne*, attended with only one of his Guard, passed the *Rhine*, and killed his Enemy in his own Chamber. Which ² *Polybius* relates was attempted by *Theodotus*, an *Aetolian*, against *Ptolemy*, King of *Aegypt*, in the same Manner, calling it, *᾽Ουκ ἀνανδρον τολμῆν*, *An Act of Bravery*. Such was that famed Enterprize ³ of *Q. Mutius Scaevola*, which he himself thus defends, *I being an Enemy would have killed an Enemy*. ⁴ *Porsena* himself acknowledged this to be an Act of great Valour. ⁵ *Valerius Maximus* calls it, *A commendable and gallant Resolution*; and *Cicero* ⁶ praises it in his Oration for *P. Sextius*.

^a *Warnefrid*,
1. 6.

^b *Justin*, 1. 2.

^c *Livy*, 1. 27.

^d *Tac. Hist.* 1. 5.

2. For to kill an Enemy any where is allowed, both by the Law of Nature and of Nations (as I have said already), neither is it of any Concern, how many or how few they be who kill or are killed. 600 *Lacedemonians* with *Leonidas* ^b marched through the Enemy's Camp to the King's (*Xerxes*) Pavilion; * *The same might have been done by fewer*. There were but a few that circumvented *Marcellus* ^c the Consul, and slew him; and but a few had almost killed *Petilius Cercalis* ^d in his Bed. ⁶ *St. Am-*

XVIII. (1) This is related after ALBERICUS GENTILIS, *De Jure Belli*, Lib. II. Cap. VIII. p. 274. who cites BONFINIUS, *Rerum Hungar.* I. 8. in the Margin.

2. *Lib. V. Cap. LXXXI.*

3. He wished to have such brave Men on his Side, *Juberem macte virtute esse, si pro mea patria ista virtus staret.* LIVY, *Lib. II. Cap. XII. Num. 14.*

4. *Caeterum inter molitionem pii pariter ac fortis propositi oppressus, &c. Lib. III. Cap. III. Num. 1.* PLUTARCH praises this *Scaevola*, as a Man distinguished by all Virtues, and especially by his Skill in military Affairs. (*Vit. Poplicol.* p. 106. B. Vol. I. *Edit. Wech.*) GROTIUS.

5. *Mortem—ego vir consularis, tantis rebus gestis, timerem? Praesertim cum ejus essem civitatis, ex qua Q. Mutius solus in castra Porsennae venisset, eumque interficere, proposita sibi morte, conatus esset?* Orat. pro *P. Sextia*, Cap. XXI.

* The Emperor *Valens* promised a Reward to whoever brought him the Head of a *Scythian*, upon which they made Peace with him; as ZOSIMUS tells us, *Lib. IV. (Cap. XXII. Edit. Cellar.)* GROTIUS.

This is not very exactly related. See the Passage in ZOSIMUS.

6. *Offic.* Lib. I. Cap. XL. And JOSEPHUS, *Antiq. Hist.* XV. There is a like Action of *Theodosius* against *Eugonius*, in ZOSIMUS, *B. IV.* of the *Gauls* against the King of *Persia*, in AGATHIAS; of ten *Persians* against *Julian*, in AMMIANUS, XXIV. and ZO-

brose commends *Eleazar*, that assaulted a mighty Elephant, <570> higher than all the Rest, supposing the King had sat upon it. Neither are they only that make these Attempts, but also they that employ them, excusable by the Law of Nations. ^e Those antient *Roman* Senators, such as religious Observers of the Laws of War, were esteemed the Authors of that gallant Attempt of *Scaevola*. ^e *Livy*, l. 2.

3. It is to no Purpose to object, that such Men, being taken, are commonly put to exquisite Torments; for that is not because they violate the Law of Nations, but because, by the same Law of Nations, any Thing done against an Enemy is lawful, and every one is more or less severe as he judges it proper for his Interest. For so are Spies used, yet it is held lawful, by the general Consent of Nations, to send such, as *Moses* did, and such was *Joshua* himself (*Ἔθος τοὺς κατασκοποῦς κτείνειν*, *It is the Custom to kill Spies*, said ⁷ *Appian*) and that justly sometimes, by such as have manifestly a lawful Cause to make War, by others with Impunity, which the Law of Arms grants. But if there be any ^f *that will not make Use of such Service when offered*, that is rather to be attributed to Magnanimity, and the Confidence of one's own Strength, than to an Opinion of its being unjust.

^f See *Cromer. Rer. Polon.* l. 5. p. 113. Edit. Basil.

4. But the Case is otherwise of those Assassins who act treacherously, for they not only transgress the Law of Nations, but also those that employ them. For tho' in other Things, they that make Use of wicked Instruments against an Enemy, may be reputed guilty before GOD, yet not before Men, that is, they have not offended against the Law of Nations; because,

⁸ *Mores leges perduxerunt in potestatem suam.*

Custom has prevailed above Laws.

SIMUS, III. of *Alexius Comnenus* against *Toruses*, in NICETAS CHONIATAS, B. IV. *De Manuele*; of the *Bulgarians* against the Emperor *Nicephorus*, in ZONARAS, (Vol. III. in *Nicephor.*) GROTIUS.

It is not *Alexius Comnenus*, but *Andronicus*, that NICETAS CHONIATES speaks of. The Fact is in Chapter IV. of the Book referred to.

7. *De Bell. Punic.* (p. 33. Edit. Amstel. 2. H. Steph.)

8. This is a Verse from PLAUTUS'S *Trinumm.* Act. IV. Scen. III. ver. 30.

And, *To deceive* (Pliny ⁹ says) *according to the Custom of the Age, is Wisdom*; yet this Custom does not reach to the killing an Enemy, for he that should thus make Use of another Man's Treachery, is held not only to ¹⁰ offend against the Law of <571> Nature, but also of Nations. This is

9. Upon a different Subject; for he speaks of those that by false Hopes deceive an avaritious Person, who wanted to get their Estates. *Alii contra hoc ipsum laudibus ferunt, quod sit frustratus improbas spes hominum; quos sic decipere, pro moribus temporum, prudentia est.* Epist. VIII. Num. 3.

10. ZIEGLER accuses our Author here of contradicting himself, and what he had advanced above; at the End of the first Chapter of this Book, § 21, 22. And it must be confessed from the Manner in which our Author expresses himself in this Place, that he seems to give Room to think, either that it is always unlawful by natural Right to make use of a Traitor, for obtaining some Advantage, or committing some Act of Hostility against an Enemy; which is contrary to the Distinction he makes in the Place referred to; or that the Law of Nations, of which he speaks, as forbidding the Assassination of an Enemy by the Hand of a Traitor, regards only those who have solicited him to Treason, and not those who have taken the Advantage of the Traitor's Disposition, who voluntarily offered himself, which would be unwarrantable; for those Nations who have held the former unlawful, have also condemned the latter. However I do not think our Author has either changed his Opinion, in Regard to his Distinction, upon which he reasons again elsewhere, or that he intended to restrain the Rule of his arbitrary Law of Nations. But here an Inaccuracy of Expression has slipt from him, which he has overlooked, I know not how, even in his Revisals of this Work. Wherefore when he says in this Place, that *We sin against GOD, and violate the Law of Nature, when we make use of wicked Instruments against an Enemy, and employ the Arm of a Traytor to dispatch him*; this should be understood according to the Distinction I have mentioned, of those only who themselves seek for such Means, and solicit Persons to commit Treason, that, perhaps, would never have entertained such a Design, without the Allurement of the Rewards promised, or even given them beforehand. As to the Thing itself, this in my Opinion may be said, I. There are two Points to be distinguished: The one, whether the Enemy himself be wronged, against whom the Traitors are used: The other, whether, tho' he be not wronged, something bad however be committed. It seems to me, that admitting the War to be just, no Wrong is done the Enemy, whether we take Advantage of the Opportunity of a Traitor, who freely offers himself, or whether we seek for it, and bring it about ourselves. The State of War into which the Enemy has put himself, and which it was in his own Power to prevent, permits of itself all Methods to be used against him; so that he has no Room to complain, whatever is done. Besides, we are no more obliged to regard the Right he has over his Subjects, and the Fidelity they owe him as such, than their Lives and Fortunes, of which we may deprive them by the Right of War. II. I believe, however, that a Sovereign who has the least Tenderness of Conscience, and is convinced of the Justice of his Cause, will not endeavour to find out treasonable Methods, in order to subdue his Enemy, nor eagerly

embrace such as may offer of themselves to him. The just Confidence which he may have in the Protection of Heaven; his Horror for the Traitor's Perfidy; the Fear of making himself an Accomplice of it, and of setting a bad Example, which may fall again upon himself and others, who have not deserved it; will make him either despise, or not accept without Regret, every Advantage he might propose to himself from such a Means. III. This Means cannot even be considered as a Thing of which the Use is always innocent, in Regard to the Person who employs it. The State of Hostility, which dispenses with the Commerce of good Offices, and authorises to hurt, does not therefore dissolve all Ties of Humanity, nor remove our Obligation to avoid as much as possible, the giving Room for some bad Action of the Enemy, or his People, especially those who of themselves have had no Part in the Occasion of the War. Now every Traitor undeniably commits an Action equally infamous and criminal. For it is absurd to think, as the late Mr. TITIUS has ventured to do, (*Observat. in PUFENDORF*, DCCL.) with a *perhaps*; that admitting the War to be just on the other Side, he who betrays his Prince, does not commit a real Act of Perfidy; because, for Instance, the Party in whose Favour he assassinates him, had a Right to kill him. This, I say, is unwarrantable; for a Subject indeed ought not to serve his Prince in a War manifestly unjust; but he is not therefore authorised to side with the Enemy; and the Injustice of a Prince towards Strangers, does not discharge his Subjects from the Fidelity they owe him. So that I believe, with our Author, we can never, in Conscience, seduce, or solicit, the Subjects of an Enemy to commit Treason; because that is actually and directly inciting them to commit an abominable Crime, to which, otherwise, they might never have proceeded of themselves. IV. The Case is different when we only take Advantage of the Occasion, and the Dispositions we see in a Person, who did not want soliciting to commit Treason. Here the Infamy of the Treachery does not rebound upon him who finds it entirely formed in the Heart of the Traitor. This Traitor, from the Moment he conceives within himself the Design of committing Treason, may be deemed to be as criminal as when he has actually committed it.

*Nam scelus intra se tacitum qui cogitat ullum,
Facti crimen habet* —————

This Maxim would not be well applied in other Respects, I confess; but that is because, excepting these Cases between Enemies, there is none, in my Opinion, where the Thing, in Regard to which we make our Advantage of the bad Dispositions of others, can be of such a Nature, that we may lawfully and innocently do it ourselves. Upon the Whole, for the Reasons alledged, we ought not to take Advantage of a Treason which offers itself, unless it be to obtain some considerable Advantage, or to avoid some great Danger; in a Word, from a Kind of Necessity. V. What I have said, regards the Law of Nature; in Respect to the Law of Nations, of which our Author speaks, and which, at Bottom, is no more than the Custom of several Nations, tho' that Custom has nothing obligatory of itself, yet, if the People with whom we are at Variance, look upon the very Acceptance of the Offers of a certain Sort of Perfidy as unlawful, as to assassinate, for Instance, one's Prince or General, we tacitly submit to it, in the Manner, and for the Reasons, mentioned above, § 15. *Note I.*

plain from what *Alexander*¹¹ wrote to *Darius*, *Ye wage impious Wars, and tho' you carry Arms, you set a Price upon your Enemies Heads.* And again, *You do not observe towards me*¹² *the Law of Arms.* And in another Place, *I ought to persecute him to Death,*¹³ *not as a just Enemy, but as a Poisoner, and an Assassin.* And to this we may refer that of *Livy*,¹⁴ concerning *Perseus*, *He does not wage a just War like a Prince, but uses all base and clandestine Villainies, like Thieves and Poisoners.* And *Marcus Philippus*, of the same *Perseus*,¹⁵ *All which, how hateful they were to the Gods, he would find by Experience.* And also *Valerius Maximus*, *The Murder of Viriatus*,¹⁶ *had a double Perfidiousness, the one in his Friends, who killed him; the other in Q. Servilius Caepio, the Consul, who was the Author of it, by promising Impunity, and who thus bought the Victory, instead of gaining it by open Force.*

5. Now the Reason why this is not allowed, as in other Cases, is what we gave before in the Case of Poison, to lessen the Dangers attending

11. *Impia enim bella suscipitis, & quum habeatis arma, licitamini hostium capita.* QUINTUS CURTIUS, *Lib. IV. Cap. I. Num. 12.*

12. *Utpote qui ne belli quidem in me jura servaveris.* Ibid. *Num. 13.*

13. *Veram enimvero, quum modo milites meos literis ad proditionem, modo amicos, &c.* *Lib. IV. Cap. XI. Num. 18.*

14. The Passage has been quoted before, § 15. *Note 3.*

15. *Ea omnia quam Diis invisa essent, sensurum in exitu rerum suarum.* LIVY, *Lib. XLIV. Cap. I. Num. 11.*

16. VIRIATI *etiam caedes, &c.* *Lib. IX. Cap. VI. Num. 4.* The Author *De Viris illustribus*, [who is believed to be AURELIUS VICTOR] says, that the Senate did not approve this Victory, because it had been bought, *Quae victoria, quia emta erat, a Senatu non probata.* *Cap. LXXI. in fin.* According to EUTROPIUS, the Murderers of *Viriatus* having demanded a Reward of the Consul, he answered them, that the *Romans* had never approved the Conduct of Soldiers who killed their General. *Quum interfectores ejus praemium a Caepione Consule peterent, responsum est, numquam Romanis placuisse, Imperatorem a suis militibus interficere.* (*Lib. IV. Cap. VIII. Edit. Cellar.*) There seems to be Reason for supplying a Word in this Passage, à *Caepione Consule promissum.* AMMIANUS MARCELLINUS disapproves also the Assassination of *Sertorius*, committed at a Feast by *Perperna*, his Lieutenant. *Lib. XXX. (Cap. I. in fin.)* GROTIUS.

It does not appear from other Authors, that the Consul *Caepio* had promised a Reward to those who killed *Viriatus*. So that the Text of EUTROPIUS is not faulty.

those who are at War, <572> especially Persons of the ¹⁷ most distinguished Rank. *Eumenes* (in *Justin*) said, *He could not believe,* ¹⁸ *that any Commander would so desire to conquer, (viz. by hiring to kill his Enemy) as to set so bad an Example against himself.* And in the same Author, when ¹⁹ *Bessus* had assassinated *Darius*, it is said, *It was not to be endured for Example's Sake, and that it was the common Cause of all Kings.* And *Oedipus*, to justify the Killing of King *Laius*, says, in *Sophocles*,

²⁰ *Κείνῳ προσαρκῶν ὄν ἐμαυτὸν ὠφελῶ.*

Assisting him, I also help myself.

And in *Seneca*, on the same Subject,

²¹ *Regi tuenda est maximè Regum salus.*

Kings should, in Honour, save their fellow Kings.

And the *Roman* Consuls, in their Letter to ²² *Pyrrhus*, *It concerns the common Interest of Nations, that we endeavour your Safety.*

6. In a solemn War then, and among those who have a Right to denounce a solemn War, it is not allowed: But where there is no solemn War it is accounted lawful, by the same Law of Nations. So *Tacitus* ²³

17. And indeed Traitors seldom offer their Service, or are applied to, but to assassinate Persons of a high Rank, as Princes or Generals.

18. *Nec Antigonium, nec quemquam ducum, sic velle vincere, ut ipse in se exemplum pessimum statuar.* Lib. XIV. Cap. I. Num. 12.

19. Our Author cites *JUSTIN* again here, *Lib. XII. Apud eundem*, says he in the Text; tho' he had mentioned him before only in the Margin. In the first Edition he had said, *Apud CURTIUM*. This was from his finding afterwards in *JUSTIN* the following Words, *Reputans [Alexander] non tam hostem suum fuisse Darium, quam amicum ejus, a quo esset occisus.* Cap. I. Num. 11. But he had Reason to cite *QUINTUS CURTIUS*, who has something more express upon this Subject. *Quem quidem [Bessum] cruci adfixum videre festino, omnibus regibus Gentibusque fidei, quam violavit, meritas poenas solventem.* Lib. VI. Cap. III. Num. 14.

20. *Oedip. ver. 139.*

21. *Oedip. ver. 242.*

22. This Passage has been quoted above, § 15. of this Chapter, *Note 6.*

23. *Nec irritae, aut degeneres, insidiae fuere adversus transfugam & violatorem fidei.* *Annal. Lib. XI. Cap. XIX. Num. 2.* *AMMIANUS MARCELLINUS*, speaking of *Florentius* and *Barchalba*, who had seized and brought the Rebel *Procopius* to the Emperor

declares the Plot against the Life of *Gannascus*, was not dishonest, because he was a Traitor. *Curtius* said, the Treachery of *Spitamenes* ²⁴ to *Bessus* was the less odious, because no Perfidiousness seemed unjust against a Murderer of his Prince. Thus Treachery towards Robbers and Pirates, tho' it be not altogether blameless, yet is not punished amongst Nations, in Detestation of those against whom it is committed.

XIX. Whether
Ravishing of
Women be
against the
Law of
Nations.

XIX. 1. The Ravishing of Women is sometimes permitted in War, and sometimes not. They that permit it, respect only the Injury done to the Body of an Enemy, which by the Law of Arms they think should be subject to all Acts of Hostility. But others, with more Reason, look not to that Injury alone, but also to the Act of Brutality, which being neither necessary for the Security of those who commit it, nor proper for the Punishment of those against whom it is committed, should be as much punished in War as in Peace; and this last is the Law of Nations, if not all, yet of the most civilized. So *Marcellus*, before he took *Syracuse*, is recorded to have taken ¹ *particular Care to preserve the Chastity, even of his Enemies*. *Scipio* (in *Livy*) said it concerned his own Honour, and that of the People of *Rome*, ² *that nothing reputed sacred, by <573> the more civilized Nations, should be profaned by them* (his Soldiers). *Diodorus Si-*

Valens, and were killed at the same Time, observes upon it, that if they had betrayed a lawful Prince, Justice itself would have passed Sentence of Death upon them; but that having betrayed a Rebel, and a Disturber of the publick Tranquillity, as *Procopius* was according to the general Opinion, so memorable an Action ought to have been amply rewarded. *Parique indignationis impetu* *Florentius*, &c. (Lib. XXVI. Cap. IX. *in fin.* p. 513. *Edit. Vales. Gron.*) The Historian *PROCOPIUS*, for the same Reason praises *Artabanus* for having killed *Gontharides*, Vandalic. *Lib. II. in fin.* (Cap. XXVIII.) See also *CROMER, Rer. Polon.* Lib. XXVIII. concerning the Murder of *Suchodolius*, (p. 604. *Edit. Basil.*) *GROTIUS*.

24. *Quae* [perfidia] *tamen jam minus*, &c. Lib. VII. Cap. V. Num. 20.

XIX. (1) *Gesset curam pudicitiae, etiam in hoste, servandae*. *AUSTIN, De Civit. Dei*, Lib. I. Cap. VI. [See *LIVY, Lib. XXV. Cap. XXV. Num. 7.*] The same Thing is related of *Lucullus*, in *DION CASSIUS*, (Lib. XXXV. p. 2. A. *Edit. H. Steph.*) See the Edict of *Gabao*, King of the *Moors*, in *PROCOPIUS, Vandalic.* Lib. I. (Cap. VIII.) *GROTIUS*.

2. *Meae, Populique Romani, disciplinae, causâ*, &c. *LIVY, Lib. XXVI. Cap. XLIX. Num. 14.*

culus complains of *Agathocles's* Soldiers, ³ οὔτε τῆς εἰς γυναῖκας ὕβρεως καὶ παρανομίας ἀπέσχοντο, *They did not abstain from that detestable Crime of violating the Chastity of Women. Aelian* speaking of the victorious *Sicyonians* ravishing the Wives and Virgins of the *Pellenaeans*, exclaims, ⁴ Ἀγριώτατα ταῦτα ὧ Θεοὶ Ἑλλήνοι, καὶ οὐδὲ ἐν βαβάροις καλὰ κατάγε τῆν ἐμὴν μνεῖαν, *These, (O ye Gods of Greece!) are Acts so cruel and abominable, as were never practised among the Barbarians, as far as I can remember.*

2. And certainly, this should be ⁵ observed among Christians, not only as a Part of military Discipline, but as a Part of the Law of Nations, *viz.* that whosoever ravishes a Woman, tho' in Time of War, deserves to be punished in every Country. For by the *Hebrew* Law none did it without Punishment, as we ⁶ may gather from that Part which treats of a captive Woman, *Deut. xxi. 10.* That the Master might marry her, but upon Dislike might not sell her. *Thou shalt not take Money for her, because thou hast humbled her.* Upon which *Beccai*, one of the *Hebrew* Doctors, thus comments, *GOD would have the Camp of Israel to be holy, not defiled with Whoredoms, and other Abominations, like the Camp of the Gentiles.* *Arrian*, speaking of *Alexander's* falling in love with *Roxana*, says, Οὐκ

3. *Lib. XIX. Cap. VIII. p. 674. Edit. H. Steph.* APPIANUS ALEXANDRINUS treats this as the Act of Barbarians, in speaking of the People of *Chios*, who were exposed to it by the Troops of *Mithridates*. *Bell. Mithridatic. p. 340. Edit. Amstel. (201. H. Steph.) GROTIIUS.*

4. *Var. Hist. Lib. VI. Cap. I.*

5. *Belisarius* always observed it, and so did *Totilas*, at the taking of *Cumae* and *Rome*. PROCOPIUS, *Goth. III. GROTIIUS.*

What our Author says here of the usual Conduct of the *Roman* General, is related in *Chap. I.* of the Book referred to, and in the twentieth Chapter we see the Care which the King of the *Goths* took, to prevent any Violence being done to the Wives, Maids, or Widows, when he made himself Master of *Rome*. As to what regards the taking of *Cumae*, I find nothing upon it; and it is likely, that our Author, citing by Memory, has put *Cumae* for *Naples*, for it was after taking of the latter, that *Totilas* condemned one of his Guards to die, for having ravished the Daughter of a *Roman*, a Native of *Calabria*; upon which that Prince made a fine Speech to those who came to intercede for the Criminal. *Chap. VIII.*

6. PHILO much commends that Law, in his Book, *περὶ φιλανθρωπίας*: And JOSEPHUS against APPION. *The Law also takes Care of Prisoners of War, to preserve them from Reproach, especially Women.* *Lib. II. p. 1075. D. GROTIIUS.*

ἐθελῆσαι ὑβρίσαι καθάπερ αἰχμάλωτον, ἀλλὰ γῆμα γὰρ οὐκ ἀπαξιώσαι, *He would not ravish her, as a Captive, but honourably married her.* Which he highly ⁷ commends. And ⁸ *Plutarch*, of the same, Οὐκ ὑβρισεῖν, ἀλλ' ἔγημε φιλοσόφως, *He scorned to debauch her, but married her; which was an Action worthy of a Philosopher.* *Plutarch* also mentions one *Torquatus*, *Banished*, by the ⁹ *Romans*, into the *Island of Corsica*, for ravishing his *Prisoner*.

7. He, says he, praises rather than blames it: *De Expedit. Alexandr.* Lib. IV. Cap. XIX. *Edit. Gron.*

8. *De Fortuna vel virtut. Alexandr.* Orat. II. p. 332. E. Vol. II. *Edit. Wech.*

9. *Cosroes*, King of *Persia*, crucified one for ravishing a *Virgin* at *Apamea*, *PRO-COPIUS*, *Persic.* Lib. II. Chap. XI. *GROTIUS.*

Of Spoil and Rapine in War.

I. Cicero, in the third of his *Offices*, declares, ¹ *It is not against the Law of Nature to spoil or plunder him whom it is lawful to kill.* No wonder then if the Law of Nations allows to spoil and waste an Enemy's Lands and Goods, <574> since it permits him to be killed. ² Polybius tells us in the fifth of his History, by the Right of War it is lawful to take away, or destroy, the Forts, Havens, Cities, Men, Ships, Fruits of the Earth, and such like Things of an Enemy. And we read in *Livy*, ³ *There are certain Rights of War, which, as we may do, so we may suffer, as the burning of Corn, the pulling down of Houses, the taking away of Men and Cattle.* We may find in History, almost in every Page, the dismal Calamities of War, whole Cities destroyed, or their Walls thrown down to the Ground,

I. *The Goods of an Enemy may be spoiled, or taken away.*

I. (1) *Neque est contra naturam, &c.* (Cap. VI.) Suetonius relates, that Nero having received Advice of some Commotions in *Gaul*, was thought to be very well pleased with the News, because he had an Occasion of plundering those rich Provinces by Right of War. *Adeoque lente ac secure tulit, gaudentis etiam suspicionem praeberet, tamquam occasione nata spoliandarum Jure Belli opulentissimarum provinciarum.* Vit. Neron. Cap. XL. St. Cyprian says, that when a City is taken by an Enemy, all those who are within it, are liable to be plundered. *Sic quum irruptione hostili civitas aliqua possessa est, omnes simul captivitas vastat.* De mortalitate, (p. 159. Edit. Brem.) GROTIUS.

2. He says, that in taking or destroying these Kinds of Things, the Enemy is weakened, and our own Affairs advanced. Cap. XI. p. 501, 502. Edit. Amstel.

3. It is the Deputies of *Athens* who speak thus in the Assembly of the *Aetolians*, and say that is not the Subject of their Complaint. *Neque id se queri, quod hostilia ab hoste passi forent: Esse enim quaedam Belli Jura, quae ut facere, ita pati, sit fas: Sata exuri, dirui tecta, praedas hominum pecorumque agi; misera magis, quam indigna, patienti esse.* Lib. XXXI. Cap. XXX. Num. 2.

Lands ravaged, and every Thing set on fire. And we may observe, these Things are lawful to be done, even to those that surrender themselves. *The Townsmen, says Tacitus, ⁴ freely set open their Gates, and yielded themselves, and all they had, to the Romans, whereby they only saved their Lives: Artaxata was burnt by the Romans.*

II. *Even those that are sacred, which how to be understood.*

II. 1. Neither does the ¹ mere Law of Nations exempt sacred Things, that are consecrated, either to the true GOD, or to false Divinities, setting aside the Consideration of other Duties, (of which we will treat hereafter) from these Insults of War. *Pomponius, the Civilian, tells us, When Places are taken from the Enemy, ² all Things therein cease to be sacred. Cicero, in his fourth Oration against Verres, observes, ³ The Victory made all the sacred Things of Syracuse profane.* The Reason of which is this, because those Things that are called sacred, are not of such a Nature, that the Moment they are consecrated to Religion, Men ⁴ cannot more

4. *Sed oppidani, portis sponte patefactis, &c.* Annal. Lib. XIII. Cap. XLI. Num. 3.

II. (1) *Jus Gentium merum*, says our Author, that is to say, that which not only grants Impunity, but even authorizes of itself to act, so that we do nothing in Conscience but what is just and innocent, whilst there is no other Consideration drawn from Duty, which engages us to abate of our Right.

2. *Quum loca capta sunt, &c.* Digest. Lib. XI. Tit. VII. *De religiosis, & sumtibus funerum, &c.* Leg. XXXVI. It is upon this TERTULLIAN founds the Reproach he casts upon the Pagans, of paying little Respect to their own Divinities: "Wars, says he, generally occasion the Taking, and the Ruin of Cities; which cannot be done without Offence to the Gods; for the Victor spares the Temples no more than he does the Walls of the Place; the Priests are exposed to Slaughter as well as the Citizens; the sacred as well as the profane Goods are plundered: So that the Romans commit as many Sacrileges as they make Conquests, as often as they triumph over Men they triumph over the Gods; and the Statues of captive Divinities make Part of all the Spoils of their conquered Enemies, which are preserved to this Day." *Porro bella & victoriae, &c.* Apologetic. (Cap. XXV.) He says lower the same Thing of the destroying of Temples. *Et bene, quod si quid adversi, &c.* (Cap. XL.) GROTIUS.

3. He says *Marcellus* did not touch those Things out of a Principle of Religion. *Has tabulas [quibus interiores templi Minervae parietes vestiebantur] &c.* In Verr. Lib. IV. Cap. LV.

4. *Revera non eripiuntur humanis usibus.* These are our Author's Terms, which I recite to defend him against a false Criticism, which, tho' it has no other Foundation than Want of due Attention, and a Desire to censure, is however proposed with great Confidence. The late Mr. COCCEIUS, in his Dissertation *De evocatione Sacrorum,*

dispose of them, and make them serve to the Uses of Life, but they⁵ belong to the <575> Publick, and are termed *sacred* on Account of the religious Use to which they were intended. For Instance, when one People submit themselves to another Nation, or King, they then deliver up what is called *divine*, as appears from the Form which we have^a elsewhere quoted, out of *Livy*; to which agrees that in *Plautus's Amphitryo*,

^a B. ii. ch. 5.
§ 31.

*They deliver up their City, Fields,
Altars, Houses, and themselves.*

And again,

*They deliver up themselves, and all they have
Divine and human.*

2. *Ulpian* infers therefore,⁶ that there is a publick Right, even in Things that are sacred.⁷ *Pausanias* tells us, that it was a common Custom

Sect. II. § 24. blames our Author, as pretending that sacred Things, whilst they remain such, are not entirely exempt from profane Uses. But the whole Sequel of the Discourse shews, he means only, that those Things do not acquire the Quality of holy and sacred, as an indelible Character, of which they cannot be deprived; but that the Sovereign, who made them so, by devoting them to the Uses of Religion, may make them return into Commerce, and thereby become profane again. GRONOVIUS, and Mr. VANDERMUELEN have very well explained this, in their Notes; and if the Author who made the Extract in the *Bibliotheca Germanica*, (Vol. I. p. 55.) had taken the Trouble to read the Passage in the Original, he would have had Occasion to find Fault with the inexcusable Inadvertency and Rashness of the *German* Civilian, who had made it his Business to criticise our Author almost every where; he would not at least have given Room to believe that he approves a Censure so ill founded.

5. See THUCYDIDES, *Lib. IV.* (*Cap. XCVIII. Ed. Oxon.*) And TACITUS, *Annal. Lib. III.* (*Cap. LXXI. Num. 2.*) This Custom appears also from a Passage of POLYBIUS, which we shall cite below, *Chap. XII. § 7.* See also MARSILIUS PATAVINUS, in his *Defensor Pacis, &c. Cap. V. § 2.* NICOLAS BOERIUS, *Decis. LXIX. Num. 1.* AEGIDIUS BOSSIUS, *Practic. Criminal. De foro competente, Num. 101.* CATHMANNUS, *Consil. C. Num. 30.* GROTIUS.

6. *Publicum jus in sacris, in sacerdotibus, in magistratibus, consistit.* Digest. *Lib. I. Tit. 1. De justitia & jure, Leg. 1. § 2.* See Mr. NOODT's Comment upon this Title, p. 5. and upon *Tit. VIII. De divis. rerum. &c. p. 27.*

7. It is in a Place where he endeavours to shew that *Augustus* was not the first that seized, by Right of War, upon Things consecrated to the Gods. *In Arcad. seu. Lib. VIII. p. 275. Edit. Graec. Wech. Cap. XLVI. Edit. Kubn.*

with the *Greeks* and *Barbarians*, that Things sacred should be at the Disposal of the Conqueror. So when *Troy* was taken, the Image of *Jupiter Hercaeus* fell to the Share of *Sthenelus*: And he brings many other Examples of the like Custom. *Thucydides*, Lib. iv. *It was a Law among the Grecians, that he who was Master of any Country, whether great or small, was also of the Temples.* To which also that in *Tacitus* agrees, *All the Ceremonies, Temples, and Images, in the Italick Towns, were at the Disposal, and under the Power of the Romans.*

3. Wherefore the People themselves changing their Minds, may turn any Thing sacred into profane, which the Civilians, ⁸ *Paulus* and ⁹ *Venulejus*, plainly intimate. And in Times of Necessity, *Sacred Things*¹⁰ have

8. *Quamvis sacra profana fieri [possunt]. Digest. Lib. XLV. Tit. I. De verborum obligationibus, Leg. LXXXIII. § 5.*

9. Where he speaks of the Nullity of conditional Stipulations, in which the Sale of Things sacred, or of such other as do not enter into Commerce, is supposed; a Condition which is considered as impossible; though the Impossibility may afterwards cease; that is, as we see, for Instance, that what is sacred may become profane. *Quum quis sub hac conditione stipulatus sit, si rem sacram aut religiosam Titius venderit, vel Forum aut Basilicam, & hujusmodi res, quae publicis usibus in perpetuum relictæ sunt, ubi omnino conditio jure impleri non potest, vel id facere ei non liceat: Nullius momenti fore stipulationem, proinde ac si ea conditio, quae naturâ impossibilis est, inserta esset. Nec ad rem pertinet, quod jus mutari potest, & id, quod nunc impossibile est postea possibile fieri: Non enim secundum futuri temporis jus, sed secundum praesentis, aestimari debet Stipulatio.* Ibid. *Leg. CXXXVII. § 6.*

10. As by the *Syracusans*, in *Timoleon's* Time, which *PLUTARCH* informs us of, in the Life of that great Captain. (p. 247. E. Vol. I. *Edit. Wech.*) The People of the Island of *Chios*, not having Money to pay the Fine laid on them by *Mithridates*, sold the Ornaments of their Temples. *APPIAN, Bell. Mithridatic.* (p. 339. *Edit. Amstel.* 201. *H. Steph.*) *Sylla* being in Want of Money, during the War against the same *Mithridates*, took what was most valuable amongst the Things consecrated to the Gods, in the Temples of *Olympia*, *Epidaurus*, and *Delphos*. *PLUTARCH, in ejus Vit.* (p. 459. Vol. I.) *APPIAN, Bell. Mithridatic.* (p. 346, 347. *Edit. Amstel.* 206. *H. Steph.*) He afterwards returned the Value of them, if we may believe *DIODORUS SICULUS*, in *Excerpt. Peiresc.* (p. 406.) *Augustus*, in a like Necessity, borrowed Money out of the Treasures kept in the Temples. *APPIAN, Bell. Civil. Lib. V.* (p. 1082. *Edit. Amst.* 678. *H. Steph.*) Sacred Things were also made Use of upon other Occasions, besides War. We see in *CASSIODORUS*, that *Agapetus*, Bishop of *Rome*, had pledged the sacred Vessels. *Var. XII. 20.* The Emperor *Heraclius*, in great Necessity, coined the Church Plate into Money; but returned the Value of it afterwards, as *THEOPHANES* tells us. See also *ANNA COMNENA, Lib. V. (Cap. I.)* and *Lib. VI. (Cap. II.)* *CROMER, Rerum Polon. Lib. XXIII.* (p. 516. *Edit. Basil.* 1655.) The Discourse of *Laurentianus*, in

been converted, even <576> by those who consecrated them, to the Uses of War, as by ¹¹ *Pericles*, but with a Promise of full Restitution, by ¹² *Mago*, in *Spain*, the ¹³ *Romans*, in the *Mithridatic War*, by *Sylla*, *Pompey*, ¹⁴

BEMBO, *Lib.* VI. and what we shall say below, *Chap.* XXI. § 23. in the Text and Notes.
GROTIUS.

The first of the Examples alledged here by our Author, is a little doubtful. PLUTARCH says only, that the *Syracusans* had so little Money, as well for the War as their other Occasions, that they sold even their Statues. And a Proof, that the Statues of their Gods are not intended, is his saying a little lower, that the *Syracusans* preserved the Statue of *Gelon*, their antient Prince, in Remembrance of the Victory obtained by him over the *Carthaginians*, at *Himera*. For the Rest, I have suppressed in this Note, where the Things were besides not sufficiently distinguished, a Passage of PLINY, which is not very much to the Purpose. It is where he says that *Cato* permitted the sacred Trees or Groves to be cut, having first made a certain Sacrifice. *Idem* [*Cato*] *arbores religiosas, lucosque succidi permisit, sacrificio prius facto: Cujus rei rationem quoque eodem volumine tradidit.* Hist. Natur. *Lib.* XVII. *Cap.* XXVIII. *sive ult. in fin.* He does not speak there of Cutting down those Trees entirely, nor of depriving them of their Sanctity, but only of lopping them in order to render them more beautiful and venerable. *Lucum conlucare, Romano more, sic oportet, &c.* See the rest of the Passage in the Book, *De re rustica*, *Cap.* CXXXIX. which the Naturalist had in View.

11. Our Author took this without doubt from THUCYDIDES, *Lib.* II. *Cap.* XIII. and from DIODORUS SICULUS, *Lib.* XII. *Cap.* XL. who both say, that *Pericles*, intending to shew the *Athenians*, that they had wherewithal to undertake War, represented to them, that besides the Money and Vessels of the Temples, they might take the Gold of *Minerva's* Statue, to whom they might restore as much after having made Use of it for the good of the Publick.

12. He plundered the Temples of the City of *Cadiz*, then in Alliance with *Carthage*. *Non aerario modo eorum, [Gaditanorum] sed etiam Templis spoliatis, &c.* LIVY, *Lib.* XXVIII. *Cap.* XXXVI. *Num.* 3.

13. Our Author had undoubtedly in his Thoughts, what APPIANUS ALEXANDRINUS informs us, that the Senate, being in want of Money to defray the Expences of the War against *Mithridates*, decreed, that the Things, consecrated by *Numa Pompilius* for the Sacrifices, should be sold. *De bell. Mithridat.* p. 317. Edit. Amstel. (185. H. Steph.)

14. I find nothing on that Head, in the Authors who have writ the Life and Actions of *Pompey*, except what DION CASSIUS says, near the beginning of *Lib.* XLI. of his History; which is, that *Pompey* got a Decree of the Senate, that the Money in the publick Treasury, and all the Presents, offered to the Gods at *Rome*, should be carried with him into *Campania*. But, as the same Historian adds a little lower, (p. 174. Edit. H. Steph.) Nothing was touched of all that, for fear of *Caesar*, after the Return and Report of the Deputies, which were sent to him.

Caesar, ¹⁵ and others. *Tiberius Gracchus* says in *Plutarch*, ¹⁶ ἱερὸν καὶ ἄσυλον οὐδὲν οὕτως ἔστω, &c. *There is nothing so sacred, so inviolable, as Things consecrated to the Gods, and yet no Body hinders the People from using, changing or removing them at their Pleasure. Our Temples, says Seneca* ¹⁷ in the *Controversies*, *are stript for the State, and we melt the Vessels consecrated to the Gods to pay our Soldiers. And Trebatius* ¹⁸ the Lawyer in *Caesar's* Time, *That is profane, which from being Sacred, or Religious, is converted to the Use of Men and into Property. Thus Germanicus used this Right of Nations against the Marsi, as Tacitus* ¹⁹ relates, *He destroyed all Things both sacred and profane, and levelled with the Ground that most famous Temple among those Nations which they called the Temple of Tansanes: To this we may add that of Virgil,*

*If my religious Hand
Your Plant has honoured, which your Foes profan'd.* Dryden.

Pausanias ²⁰ observes, that Things consecrated to the Gods *used to be taken by the Conquerors*; and *Cicero* ²¹ calls it the Law of Arms, speaking

15. Our Author probably remembered what he had read in Suetonius; that *Caesar* when in *Gaul*, plundered the Temples, that were full of the Offerings, which had been made to the Gods: *In Gallia sana templaque Deum, donis referta, expilavit.* Cap. LIV. See also *Dion Cassius*, *Lib. XLII. and XLIII.* *Caesar* himself however, to justify the civil War in which he had engaged, complains amongst other Things, that the Money had been taken out of the Temples by the opposite Party: *Pecuniae a municipiis exiguntur, & a fanis tolluntur: Omnia divina & humana jura permiscetur.* De Bell. Civil. *Lib. I. Cap. VI.*

16. *Vit. Tiber. & C. Gracch.* p. 832. A. Vol. I. Edit. Wech.

17. *Pro republica plerumque templa nudantur, & in usum stipendii dona conflamus,* *Lib. IV. Excerpt. Controv. IV.*

18. *Eo accedit, quod Trebatius, &c. Apud Macrobius. Saturnal. Lib. III. (Cap. III.)* The Grammarian *Servius*, speaking of the Temple of *Ceres*, which stood without the Gates of *Troy*, says, that *Aeneas*, who appointed that Place for the Rendezvous of his People, well knew, that it had been profaned before: *Nam Aeneas scit ante esse profanatum.* In *Aeneid. II. (Ver. 713.)* He makes the same Remark upon *III. IX. and XII. Books.* And he says on *Eclogue VII.* that Presents, offered to the Gods, are sacred so long as they have not been rendered profane: *Dona autem oblata numinibus, tamdiu sacra sunt, & dona possunt dici, quamdiu non fuerint profanata.* (In *Ver. 31.*) *Grotius.*

19. *Profana simul & sacra, &c. Annal. Lib. I. Cap. LI. Num. 2.*

20. In the Passage cited above upon Paragraph II. of this Chapter, *Note 7.*

21. *P. Servilius quae signa atque ornamenta ex urbe hostium vi & virtute capta,* *BELLI*

of *P. Servius*, *He took away*, says he, *the Images, and the Ornaments of the Enemy's City, taken by <577> Force and Valour, by the Law of Arms, and Right of Conquest.* So ²² *Livy* concerning the Ornaments taken out of the Temples at *Syracuse* by *Marcellus*, and brought to *Rome*, said *they were got by the Right of War.* And ²³ *C. Flaminius* in his Oration for *M. Fulvius*, *The Images were carried away, which is commonly done at the taking of Cities.* Also *Fulvius* ²⁴ calls this very Thing the Right of War. And *Caesar* ²⁵ in *Sallust* relating the Miseries that usually fall on the Conquer'd, mentions *the robbing of the Temples.*

4. It is true however that, if it be believed, that there is any Deity in this or that Image, then to break or spoil it, is to them that are of that Opinion, a great Impiety. And upon this Supposition they that commit such Things are so often accused of Wickedness, and even of violating the Law of Nations; but if the Enemy be of another Opinion, then it is not so. As it was not only permitted, but commanded the *Jews*, (*Deut. vii. 5.*) utterly to abolish the Idols of the *Gentiles*; for that they were

LEGE *atque imperatoria jure sustulit, &c.* In *Var. Lib. I.* (Cap. XXI.) VIRGIL mentions a Shield, which the *Greeks* had taken out of the Temple of *Neptune*, where it had been consecrated

*Et clipeum efferrī jussit, Didymaonis artes
Neptuni sacro Danais de poste refixum.*

Aeneid. Lib. V. (Ver. 359, 360.) *Fabius Maximus*, as PLUTARCH relates, after having taken *Tarentum*, caused a Statue of *Hercules* of an extraordinary Bigness to be carried to *Rome*, leaving the *Tarentines* the rest of their Gods, because offended against them for their Crimes. *Vit. Fab. Max.* (p. 187. C. Vol. I.) To this may be referred the Passage of TERTULLIAN, which we have cited above, § 2. *Note 2.* and another from the same Father, where he says the same Thing: *Tot deinde de Deis, quot de gentibus triumphī: Manent & simulacra captiva: Et utique sentiunt, quos non amant.* Ad *Nationes, Lib. II.* (Cap. XVII.) GROTIUS.

22. *Ornamenta urbis, signa, tabulasque, &c.* Lib. XXV. Cap. XL. Num. 2.

23. *Ambraciam oppugnatam & captam, &c.* Idem, *Lib. XXXVIII.*

24. *Fulvius*, in the Speech he made to justify his Conduct, asks whether this was the only City exempt from the Rights of War: *Nisi Syracusarum, &c.* Idem, (*Lib. XXXI. Cap. IV. Num. 12.*) See also POLYBIUS, *Excerpt. Legat. XXVI.* GROTIUS.

25. *Quae belli saevitia esset, quae victis acciderent, &c.* (Bell. *Catilen. Cap. L. p. 156.* Edit. *Wass.*) *Cosroez* plundered a Church in *Antioch*, as PROCOPIUS relates, *Persic. Lib. II.* [Cap. IX. but preserved the Building for a certain Sum paid him.] See CROMER, *Rerum Polon. Lib. XVII.* (p. 402.) GROTIUS.

forbid to take them to themselves, the Reason was, to create in the *Hebrews* the greater Detestation of their Superstitions, by supposing that the very Touch of them was polluting: And not that what was consecrated to strange Gods should be spared, as Josephus ²⁶ *expounds it*; doubtless in Flattery to the *Romans*, as he does in the Exposition of another Precept, of not naming the Gods of the Heathen, which he explains by ²⁷ not speaking reproachfully of them; whereas the true Sense is that they should not name them with any Honour and Reverence, or without testifying an Abhorrence. For the *Hebrews* knew certainly, by the immediate Instruction of GOD himself, that there resided in those Images neither the Spirit of GOD, nor good Angels, or any Virtue of the Stars, as the deluded *Gentiles* imagined; but wicked *Daemons*, and such as are destructive to Mankind. Therefore *Tacitus* justly said, in describing the Rites and Ceremonies of the *Jews*, ²⁸ *All Things sacred to us, are profane to them*. No wonder then if we read of so many Idol-Temples burnt by the *Macchabees*. So also *Xerxes*, when he destroyed the Images of the *Grecians*, did nothing against the Law of Nations, tho' the *Grecian* Writers ²⁹ cry out upon it as a heinous Crime, to render their Enemy

1 *Mac. v. and*
10.

26. The two Laws ill explained, are in the same Place of that Author: Let no one speak ill of the Gods, held by other States to be such. Let no one plunder the Temples of Strangers, nor take away any Thing consecrated to any God. *Antiq. Jud.* Lib. IV. Cap. VIII.

27. See the foregoing Note. He says elsewhere, that their Law forbids them to scoff at, or speak ill of, those whom Strangers hold for Gods; because of the Name of GOD, which they bear. *Contra Apion.* Lib. II. p. 1077. D. Others believe, and with more Reason, that the *Jewish* Historian intended hereby to explain another Law, namely, that of EXODUS xxii. 28. where the Original says in so many Words, *Thou shalt not revile the Gods*. By *the Gods*, the Legislator manifestly understands the Magistrates, as appears from the following Words, which are a Comment upon those that go before, *Nor curse the Rulers of thy People*. But JOSEPHUS has taken the Word *Gods* in the literal Sense; and if he did so sincerely, the Motive our Author mentions, no doubt contributed to his falling into that Error.

28. *Profana illic omnia, quae apud nos sacra.* *Histor. Lib. V. Cap. IV. Num. 1.*

29. TROGUS POMPEIUS, imitating without doubt the Language of the *Greek* Authors, from whom he composed his History, says, in JUSTIN's Abridgment, which we have, that *Xerxes* seemed to have designed to make War upon the Gods as well as upon Men: *Ante navalis praelii congressionem miserat Xerxes quatuor millia armatorum Delphos, ad templum Apollinis diripiendum: Prorsus quasi non cum Graecis tan-*

odious. For the *Persians*³⁰ did not believe there was any Divinity in them; but they <578> imagined the Sun was the only true GOD,³¹ and Fire one of his Parts. By the *Hebrew Law*, as the same *Tacitus* rightly observes,³² *none were allowed to enter the Temple but the Priests only.*

5. But *Pompey*,³³ says the same Author, entred the Temple by the Right of Conquest; or as St. *Augustine* relates it,³⁴ *none with the Devotion of a Suppliant, but by the Right of a Conqueror.* He did well to spare the Temple, and the Treasures of it, tho' as *Cicero*³⁵ expressly said, out of meer Shame, and to avoid Occasions of Reproach, not out of any Rev-

tum, sed & cum Diis immortalibus bellum gereret. Lib. II. Cap. XII. Num. 8, 9. See the Passage of *CICERO* cited in the following Note.

30. This is the Reason given for it by *ASCONIUS PEDIANUS*, whom our Author cites in the Margin. *CICERO*, to aggravate the Crime of *Verres*, who had plundered amongst others the Temple of *Delos*, sacred to *Apollo*, says that even the *Persians*, who, when they carried the War into *Greece*, had declared it against both the Gods and Men, (the *Roman* Orator here speaks the Language of the *Greek* Authors) being arrived at *Delos*, with a Fleet of a thousand Sail, did not violate or touch the Temple in question. *Tantaque ejus auctoritas religionis & est, & semper fuit, ut ne Persae quidem, &c.* In *Verr.* Lib. I. Cap. XVIII. The antient Commentator observes upon that, that the *Persians* made no Scruple to destroy Temples and Statues, because, according to the Ideas of their Nation, they believed, that no Temples ought to be built to the Gods; and the rather, because the whole World would scarce suffice for the Temple of the Sun alone, which those People adored: *DIIS HOMINIBUSQUE quia non solum hostes erant, utpote Barbari; verum etiam, more gentis suae, nulla Diis in terris templa condenda esse credebant; praesertim, quum uni Soli, quem venerarentur, vix mundus ipse sufficeret.* Our Author cites also in a little Note, what *DIOGENES LAERTIUS* says, that the *Magi* condemned the Use of Statues. *Lib. I. § 6.* Edit. Amstel. See *MENAGE* upon it, and the *Index Philologicus* of Mr. *LE CLERC* upon *STANLEY's History of the Eastern Philosophy*, at the Word *Statuae*.

31. The Reader may see upon this Head the History of the *antient Persians*, writ in *Latin* by the late Mr. *HYDE*, a learned *Englishman*, who has endeavoured to prove, that those People of old adored neither Fire, nor the Sun, but the true GOD; which, he believes, is to this Day the Religion of some of their Descendants.

32. *Ad fores [Templi Hierosolymitani] tantum Judaeo aditus: limine, praeter Sacerdotes, arcebantur.* Hist. Lib. V. Cap. VIII. Num. 2.

33. *Romanorum primus, Cn. Pompeius Judaeos domuit. Templumque JURE VICTORIAE ingressus est.* Histor. Lib. V. Cap. IX. Num. 1.

34. *Pompeius ergo, Populi Romani praeclarissimus Princeps, Judaeam cum exercitu ingressus, civitatem capit, templumque reserat, non devotione supplicis, sed JURE VICTORIS, De Civit. Dei, Lib. XVIII. Cap. XLV.*

35. *At Cn. Pompeius, captis Hierosolymis, &c. Orat. pro L. FLACCO, Cap. XXVIII.*

erence; but he did ill to enter it again, as in Contempt of the true GOD, which the Prophets so highly blame the *Chaldeans* for; (*Daniel* v. 23.) for which Cause some think it was so ordered by the Divine Providence, that the same *Pompey* should be killed at *Casius*, a Promontory of *Egypt*, as it were in sight of *Judea*; but if we consider the Opinion of the *Romans*,³⁶ there was nothing done by him against the Law of Nations. So *Josephus* [[³⁷]] mentioning the Destruction of the same Temple by *Titus*, adds that it was done, τῷ τοῦ πολέμου νόμῳ, *by the Right of War*.

III. *Yea, and Sepulchres, adding a Caution.*

III. What we have said of Things sacred, may also be understood of Things¹ religious, (or Sepulchres) for these also do not belong to the Dead, but to the Living, whether a People, or a Family. Wherefore *Pomponius* observes, in the abovementioned Place, that as sacred Things, so likewise Sepulchres cease to be such, when taken by the Enemy; and² *Paulus* the Lawyer says, *The Sepulchres of our Enemies are not religious to us, and therefore we may take the Stones thereof, and put them to any Use*. Which yet is so to be understood, that no Violence be offered to the Bodies of the Dead, which³ we have shewed in another Place, to be contrary to the Rights of Burial established by the Law of Nations.

IV. *How far Fraud may be used in this Case.*

IV. This I shall also here repeat, that the Goods of our Enemies may be taken away from them, not only by plain Force, by the Law of Nations,

36. There is besides another Reason, which might justify the *Pagans* against the Reproach of Sacrilege, even when they plundered the Temples of the Gods whom they acknowledged as such. And that is, because they imagined, that when a City was taken, the Gods, who were adored in it, abandoned their Temples and Altars at the same Time; especially after they had been called out, they and all the sacred Things, with certain Ceremonies. See the learned GRONOVIVS's Note upon § 2. of this Chapter, and the Dissertation of Mr. COCCEIUS, *De evocatione Sacrorum*.

37. [[Footnote number missing in text, supplied from Latin edition.]] *De bell. Jud.* Lib. VII. Cap. XXIV. p. 56. G. *Titus* says elsewhere, that he was desirous of saving the Temple, and so to forget the Right of War. *Cap.* XXXIV. p. 963. F.

III. (i) Sepulchres were consecrated to the *infernal* Gods, whereas sacred Things were for the other Gods. See Mr. NOODT upon the *Digest*, Lib. I. Tit. VIII. p. 58.

2. *Sepulcra hostium, &c.* *Digest*, Lib. XLVII. Tit. XII. De sepulcro violato, *Leg.* IV.

3. It suffices to say, that this is of no Use either for our Defence, the Support of our Rights, or in a Word for any lawful End of War.

but even by Fraud, so it be without Treachery; nay, in this Case, ¹ we may solicit others to betray our Enemy. For, in regard to such Sort of Actions, less vicious and very common, the Law of Nations now uses a Kind of Connivance, as the civil Laws do with respect to Prostitution and Usury. <579>

IV. (1) See what is said upon the foregoing Chapter, § 18. *Note* 10.

Of the Right to the Things taken in War.

I. *What the Law of Nature is, concerning Things taken in War.*

I. 1. Besides the Impunity of some Acts allowed to be used against our Enemies, of which we have treated hitherto; there is also another Effect, which ¹ by the Law of Nations is proper to a solemn War. And indeed by the Law of Nature those Things may be acquired by a just War, *which are* ^a *either equivalent to that, which tho' due to us, we cannot otherwise get, or which damnifies the Injurer, but within the Bounds of a just Punishment,* as has been said ^b elsewhere. By Virtue of his Right *Abraham* ² *offered unto GOD the Tenth of his Spoil he took from the five Kings,* Gen. xiv. as the Author to the *Hebrews* expounds it, *Heb.* vii. 4. and thus did

^a *B. 2. ch. 7. § 2.*

^b *Ibid. ch. 20.*

I. (1) See what we say upon the last Paragraph of this Chapter.

2. "We should add," (says Mr. LE CLERC in his Comment upon this Passage) "that the Effects of others become ours, when having raised an Army at our own Expence, we carry off such Effects from those, who had taken them, whilst the Persons, to whom they had belonged, remained in quiet. For it was not of the Spoils only of the Kings, that came from beyond the *Euphrates*, that *Abraham* offered the Tenth, but of the recovered Goods also of the People of *Sodom*, and other Neighbours; the remainder of which that Patriarch returned to their antient Proprietors, after having offered the Tenth." This is what the learned and judicious Commentator says, and is agreeable to what our Author himself lays down below, § 7. where however he has forgot this Example. It appears also from the last Verse of the Chapter of *GENESIS*, from which this History is taken, that the Patriarch kept out of the Booty recovered, besides the Provisions consumed by his People, the Part which was due to his Allies, *Haner*, *Eschol*, and *Mamre*, as our Author observes in a small Note, where he refers to what *JOSEPHUS* says on this History, *Antiq. Jud.* (Lib. I. Cap. XI.) and what he says himself below, *Chap. XVI. § 3.* For the rest, we must suppose here, that those, who do not attempt to recover their Effects, have both an Opportunity and the Means of doing it. See what we say below upon *Chap. XVI. § 3. Note 2.*

the ³ *Grecians, Carthaginians and Romans* make the same Offering to their Gods, as to *Apollo*, to *Hercules*, to ⁴ *Jupiter Feretrius*. The Patriarch *Jacob* leaving an especial Legacy to *Joseph* above his Brethren, *I give to thee* (says he) *one Part above thy Brethren which I took out of the Hand of the Amorite, with my Sword and with my Bow*, Gen. xlvi. 22. where ⁵ *the Word, I took*, seems to be taken prophetically for *I shall surely take*, and this attributed to *Jacob*, which was done after by his Posterity, who were called by his Name, as if the Ancestor and his Children were but one and the same Person. Which is much better than to wrest these Words, as the *Jews* do, to that plundering of the *Sichemites*, which had been done before by the Sons of *Jacob*; for that, as being done treacherously, *Jacob* a just and religious Man did ever condemn, as we may see, Gen. xxxiv. 30. and xlix. 6.

2. Now that this Right to the Spoils taken in a just War, was approved of by GOD, within the natural Bounds prescribed, (as I said) will appear, by other Places also of Scripture. GOD in his Law, *Deut. xx. 14.* concerning a City, which upon Refusal of Surrender was afterwards taken by the Sword, thus orders, *Thou shalt take the Spoil of it to thy self, and shalt enjoy the Prey of thine Enemies, which the LORD hath given thee.* Also the *Reubenites* and *Gadites*, and half the Tribe of *Manasseh* are said to have conquered the *Ituraeans* and their Neighbours, and to have taken much Spoil from them, 1 *Chron. v. 20, 21, 22.* This being added as a Reason, because in the War they called upon GOD, and he was propitious to them. It is also said of good King *Asa*, that having called upon GOD, he obtained the Victory over the *Ethiopians* ⁶ that had unjustly warred against him, and carried away much Spoil, 2 *Chron. xiv. 13.* which is the more remarkable, because those Wars had been undertaken not

3. See SELDEN's Dissertation upon *Tithes*, Sect. III. translated into *Latin* by Mr. LE CLERK, and inserted at the End of his Commentary upon the *Pentateuch*.

4. Our Author, as GRONOVIVS observes, confounds here the Tenth, with what the *Romans* called *Spolia opima*, which were dedicated to *Jupiter Feretrius*.

5. The *Chaldee Paraphrase* expounds it done by his Prayers to GOD, who by his special Favour preserved *Sichem* for *Jacob* and his Posterity. GROTIUS.

6. Or rather over the *Madianites*; for they are meant by the *Chusites*. See BO-CHART's *Phaleg*. Lib. IV. Cap. II.

by the special Command of GOD, but by Virtue of the common Right of all Mankind. <580>

3. *Joshua* also blessing the *Reubenites*, *Gadites*, and half the Tribe of *Manasseh* before mentioned, said, *Divide the Spoil of your Enemies with your Brethren*, Jos. xxii. 8. And when *David* sent to the Elders of *Israel* the Spoil taken from the *Amalekites*, he gave it this honourable Title, *a Spoil taken from the Enemies of the Lord*, 1 Sam. xxx. 26. For, as *Seneca* says, ⁷ Military Persons think it *most honorable to enrich Men with the Spoils of their Enemies*. We have also divine Laws for dividing such Spoils, *Num.* xxxi. 27. And *Philo* ⁸ reckons among the Curses of the Law, that their Fields should be reaped by their Enemies, whence must follow, *Famine to their Friends, and Plenty to their Enemies*.

II. *What the Law of Nations is in this Case, of which Examples are given.*

II. 1. Moreover, by the Law of Nations, not only he that makes War for a just Cause, but every Man in a solemn War acquires the Property of what he takes from the Enemy, and that without Rule or Measure; so that both he and his Assigns are to be defended in Possession of them ¹

7. *Et, quod est militaribus &c.* De Benef. Lib. III. Cap. XXXIII.

8. *Lib.* De Diris & Execrat. *init.* p. 930. A. Edit. Paris.

II. (1) See what we have said upon Chapter IV. of this Book, § 4. *Note 1.* It may be proper to relate here, what Mr. CARMICHAEL, Professor at *Glasgow*, says in his Notes upon the Abridgment of PUFENDORF, *De Officio Hom. & Civ.* Lib. II. Cap. XVI. p. 303 & seqq. He distinguishes between *moveable* and *immoveable Things*. The Acquisition of the first ought to be regarded as valid and lawful, because if the antient Proprietors could reclaim them from neutral People, where they are transported in consequence of Commerce, every State would see itself thereby exposed to enter into the War against its Will, as it would be obliged to examine, whether the Things reclaimed be good Prize, and consequently which Side has the best Cause. But as to Things immoveable, I do not find (adds this Author) that it is established by the common Consent of Nations, that the antient Owner ought to have less Right against the Third, who holds them of the Enemy, by what Title soever, than against the Enemy himself; unless that antient Owner has declared, in some manner or other, that he abandons his Right. All that can be said is, if the neutral People owe any real Servitude to the Lands, which an Enemy has taken from his Enemy, they may discharge it to the new Possessor, without the antient Proprietors having just Room to complain. I approve this Distinction in the main. But as I do not acknowledge that common Consent of States, upon which he founds the Law of Nations after our Author, it suffices for me to say, that moveable Things, being easily transferred by Commerce into the Hands of the Subjects of a neutral State, often without their

by all Nations; which, as to the external Effects of it, may be called the Right of Property. Thus said *Cyrus* in *Xenophon*, ² *It is an eternal Law with all Men, when a City is taken by Force, the Goods all belong to the Conqueror.* And so *Plato*, ³ *All that belonged to the Conquered, now belong to the Conqueror.* And in other Places, among several, as it were, Kinds of ⁴ natural *Acquisitions*, he places *πολεμικὴν*, that got by *War*, which he also calls *ληιστικὴν* by *plundering*, and *χειρωτικὴν* by *superior Force*. To which agrees *Xenophon*, ⁵ in whom *Socrates* brings *Euthydemus* by divers Interrogatories to this Confession, that it was not always unjust to spoil, when against an Enemy.

2. And in *Aristotle*, ⁶ *The Law, which is a Kind of general Agreement, has allowed, that the Goods and Effects of the Conquered should become the Conquerors.* As also that of *Antiphanes*, ⁷ *ὄτι τοῖς πολεμίοις, &c. We ought to wish our Enemies abundance of Riches without Valour, for in that*

knowing that they were taken in War, the Tranquillity of Nations, and the State of Neutrality require, that they should always be reputed lawful Prize. But the Case is not the same in regard to Immoveables. They are immoveable in their Nature: And those, to whom a State, which has taken them from an Enemy, would resign them, can hardly be ignorant of the manner, in which it possesses them.

2. He speaks both of Things and Men. *De Institut. Cyri*, Lib. VII. Cap. V. § 26. *Edit. Oxon.*

3. *De Legib.* Lib. I. p. 626. B. Vol. II. *Edit. H. Steph.*

4. *Sophist.* p. 219. D. E. Vol. I. and *Ibid.* p. 222. C.

5. *Memorab. Socrat.* Lib. IV. Cap. II. § 15.

6. *De Republ.* Lib. I. Cap. VI. p. 301. D.

7. This does not belong to *Antiphanes*, but ANTISTHENES, the Cynick Philosopher; and I find the Passage so expressed in STOBÆUS, *Florileg.* Tit. LIV. *De Imperat.* under the Name of the latter. I have observed a like Error either of our Author, or his Copists, in his Commentary upon the second Commandment of the *Decalogue*, where *Antiphanes* is cited in the same manner for *Antisthenes*, in Reference to the Invisibility of GOD; a Passage, which is recited above, B. II. *Chap. XX.* § 45. *Num.* 2. in a Note, and ascribed to the true Author of it. For the rest, STOBÆUS took this Saying from PLUTARCH, who gives it also to *Antisthenes*, *De Fortun. Alexandr. Orat.* II. p. 330. A. Vol. II. *Edit. Wechel.* From whence it appears, that there was no Reason to suspect the Error to be in STOBÆUS, where the Names of the Authors cited, are sometimes confounded. Let me also observe, that this Apophthegm of the antient Philosopher is omitted in STANLEY's philosophical History, and even in the *Latin* Version of the late Mr. OLEARIUS, who had taken upon him to supply what was wanting in the Original.

Case they belong, not to the present Possessors, but their Conquerors. ⁸ And *Plutarch* observes in the *Life of Alexander*, <581> *What did belong to the Vanquished, is and ought to be esteemed the Vanquishers.* And in another Place, ⁹ *The Goods of those overcome in War are the Reward of the Victors.* Which are the Words of *Xenophon*, in his second Book of his *Institution of Cyrus*. And *Philip* in his Letter to the *Athenians* says, ¹⁰ *All of us enjoy Cities, which were either left us by our Ancestors, or we became Masters of by the Right of War.* Also *Aeschines*, ¹¹ *If you fight with us, and take our City by Arms, you justly possess the Rule over it by the Law of War.*

3. *Marcellus* ¹² in *Livy* declares, that what he took from the *Syracusans* he did it by the *Right of War*. The *Roman* Embassadors told *Philip*, ¹³ concerning the Cities of *Thrace*, and some others, if he had taken them by War, he might enjoy them by the *Right of War*, as the *Reward* of his *Victory*. And *Masinissa* ¹⁴ pleads, the Land which his Father conquered from the *Carthaginians* he held by the *Law of Nations*. So ¹⁵ *Mithridates* in *Justin*, he had not called his Son out of *Cappadocia*, which as a *Conqueror* he possess by the *Law of Nations*. *Cicero* ¹⁶ tells us, that *Mitylene*

8. It is one of *Alexander's* Courtiers, who makes this Reflection upon that *Conqueror's* Saying, when he took the Tent of *Darius*, that he would go and bathe also in the Bath of the conquered King, in order to cleanse himself from the Dust of the Battle: *SIRE*, said the Courtier to him, *say the Bath of Alexander, and not the Bath of Darius; for what belonged to the vanquished, &c.* Vit. Alexandr. (p. 676. A. Vol. I. Edit. Wech.) *Alexander* says himself upon another Occasion, that he had forgot that the Goods of the vanquished were the *Victor's*. [P. 684. A.] GROTIIUS.

9. *Cyrop.* Lib. II. (Cap. III. § 2. Edit. Oxon.) These Words which our Author gives us as taken by *PLUTARCH* from *XENOPHON*, I do not find any where.

10. *Epist. ad Athenien.* apud *DEMOSTHEN.* p. 64. B. Edit. Basil 1572.

11. *Orat. de male obita legat.* (p. 251. B.) *DIODORUS SICULUS* says, That we ought not to give up what we acquire by the *Right of War*. *Excerpt. Peiresk.* (p. 406.) See a Passage of *AGATHIAS*, cited below, *Chap. VIII.* § 1. Note 10. GROTIIUS.

12. The Passage has been already cited upon *Chap. IV.* of this Book, § 5. Note 3.

13. *Si Philippus bello cepisset, &c.* *LIVY, Lib. XXXIX. Cap. XXIX. Num. 2.*

14. *Ceperat cum [Agrum] ab Carthaginiensibus, &c.* *LIVY, Lib. XL. Cap. XVII. Num. 2, 4.*

15. *Non Cappadocia filium, &c.* *Lib. XXXVIII. Cap. V. Num. 6.*

16. *Quid Mytilenae? quae certè vestrae, QUIRITES, belli lege ac victoriae jure, factae sunt.* *Orat. De Lege Agrar. contra Rull. Cap. XVI.*

became the *Romans* by Right of War and Victory. He likewise says,¹⁷ that some Things may become a private Property, either by Seizure, where they are without an Owner, or by War, when one Party proves victorious over the other. And *Dion Cassius*,¹⁸ *What was the Conquered's, becomes the Conquerors*. And *Clemens Alexandrinus*¹⁹ informs us, that the Goods of Enemies are plundered and acquired by the Right of War.

4. *What is taken from the Enemy, by the Law of Nations, immediately becomes the Captors*,²⁰ is the Opinion of *Cajus* the Lawyer. *Theophilus* the Greek Paraphrast on the Institutes, calls it *φυσικὴν κτήσιν*,²¹ a natural Acquisition, as²² *Aristotle* had called it, *πολεμικὴν φύσει κτητικὴν*; because the Right here acquired arises from the bare Fact, or taking Possession, without any other Title; as²³ *Nerva* the Son, by the Testimony of *Paulus* the Lawyer, declared the Property of Things begun from a natural Possession, and some Footsteps of it remain still in regard to those Animals that are taken, whether on the Earth, in the Sea, or in the Air; as also in regard to Things taken in War, all which are the Right of those who are the first Possessors of them.

5. It must be observed here that those Things are supposed to be taken from an Enemy, which are taken from the Subjects of an Enemy. So *Dercyllides* argues in *Xenophon*,²⁴ since *Pharnabazus* was an Enemy to

17. *Sunt autem privata, &c.* De Offic. Lib. I. Cap. VII.

18. This Passage is in Lib. XLI. towards the End.

19. It is upon the Occasion of the *Israelites* carrying away the Vessels of Gold and Silver of the *Egyptians*, when they quitted *Egypt*. That Father says, they did so, either by way of Amends for what the *Egyptians* owed them, for the severe Labour they had forced them to undergo, or by Right of War, against a People, who had reduced them against their Will to a cruel Slavery. *Stromat.* Lib. I. Cap. XXIII. p. 416. *Edit. Oxon.* In which he only copies *PHILO* the Jew, as appears by the Passage, which the learned Bishop of *Oxford* cites in his Notes, and our Author gives below at length upon Chap. VII. of this Book. § 6. *Num.* 8.

20. *Item quae ex hostibus capiuntur, Jure Gentium statim capientium fiunt.* Digest, Lib. XLI. Tit. I. *De acquirendo rerum dominio.* Leg. V. § 7. See also the *Institutes*, Lib. II. Tit. I. *De divisione rerum*, § 17.

21. *Lib. II. Tit. I. § 17.*

22. *Politic.* Lib. I. Cap. VIII. p. 304. D. Vol. II. *Edit. Paris.*

23. *Dominiumque rerum ex naturali, &c.* Digest, Lib. XLI. Tit. II. *De adquir. vel amittenda possess.* Leg. I. § 1.

24. *Hist. Graec.* Lib. III. Cap. I. § 23.

the *Lacedemonians*, and *Mania* a Subject to *Pharnabazus*, therefore the Goods of *Mania* were just Prize by the Law of Nations. <582>

III. *When
moveable
Goods are said
to be taken by
the Right of
Nations.*

III. 1. Moreover, by the Consent of Nations, Things are then said to be taken in War, when they are so detained, that the first Owner has lost all probable Hopes of recovering them, and cannot pursue them, as ¹ *Pomponius* determines a like Question. This takes Place, in Regard to moveable Things, when they are carried home, that is, into Places whereof the Enemy is Master. For in the same Manner a Thing is lost it is recovered by Postliminy; but it ² returns to its antient Proprietor, as soon as it comes again into the Dominions of the Sovereign on whom he depends; which is explained elsewhere, ³ by *Places whereof he is Master*.

III. (1) It is where he speaks of Things taken away by some Beast; for in his Opinion, they are deemed lost to the Person from whom they are taken, when the Beast is secured from his pursuit: *Ita ex bonis quoque nostris capta a bestiis marinis & terrestribus, &c.* Digest, Lib. XLI. Tit. I. De adquir. rerum domin. Leg. XLIV. See above, B. II. Chap. IV. § 5. Num. 2. But there is a Difference between this and the Case, to which our Author compares it, that will not permit us to form the same Judgment of it; because according to the Lawyer, it is presumed, that the Owner has abandoned his Goods, when he can pursue the Beast no longer that took them away; whereas between two Enemies there is no room for such a Presumption. Every Enemy, as such, and whilst he continues such, retains the Will to recover what the other has taken from him. His present Inability only reduces him to wait for a more favourable Opportunity, which he still seeks and desires. So that, in regard to him, the Thing ought no more to be deemed taken, when in a Place of Safety, than whilst he is still in a Condition to pursue it: All that can be said is, that in the latter Case the Possession of the Enemy is not so secure as in the former. The Truth is, this Distinction has been invented to establish the Rules of the Right of Postliminy, or the manner in which the Subjects of the State, from whom something has been taken, re-enter upon their Rights, rather than to determine the Time of the Acquisition of Things taken between Enemies. See TITII, *Observ. in Compend. Lauterbach.* Obs. 1446. and what we say below, upon Chap. IX. § 16.

2. *Postliminio rediisse videtur, quum, &c.* Digest. Lib. XLIX. Tit. XV. *De Captivis & Postliminio, &c.* Leg. XIX. § 3. *Si id, quod nostrum hostes ceperunt, ejus generis est, ut postliminio redire possit; simul atque ad nos redeundi causâ, profugit ab hostibus, & intra fines imperii nostri esse coepit, postliminio rediisse existimandum est.* Ibid. Leg. XXX.

3. *In bello* [Postliminii jus competit] *quum hi, qui nobis hostes, sunt, aliquem ex nostris ceperunt, & intra praesidia sua perduxerunt.—Antequam in praesidia perducatur hostium, manet civis.* Ibid. Leg. V. § 1.

And *Paulus* ⁴ the Lawyer affirms, that Man to be taken that is carried out of our Bounds. And *Pomponius* ⁵ declares, that Man to be taken in War, whom the Enemy has taken from us, and carried into Places whereof they are Masters; for till then he is reputed our Subject.

2. And by this Law of Nations the Case is the same with Respect to Goods as Persons, whereby we may easily perceive, that when in other Places Things taken are said immediately to be the Captors, ⁶ it ought to be understood upon Condition that they continue so long in their Possession; whence it seems, by Consequence, that at Sea, Ships, and other Things are then only said to be taken, when they are brought into the Enemy's Harbours, or the Place where their whole Fleet rides, for then there is no Hope of Recovery. But by a new Law of Nations, ^a established among the States of *Europe*, they are accounted lost, ⁷ if they continue twenty-four Hours in the Enemy's Possession. <583>

^a *Consulat. Maris. c. 283. & 287. Constit. Gall. l. 20. tit. 13. art. 24.*

4. In the first of the two Laws cited above on this Paragraph, *Note 2*. See below, *Chap. IX. § 5. and 16.*

5. In the Law cited above, *Note 3*.

6. See the Law cited in *Note 20*, upon the foregoing Paragraph. *ZIEGLER* is for having the Word *Statim* of the *Roman* Lawyers taken literally. But *OBRECHT* defends our Author's Explanation; and founds his Opinion upon this Example, chosen from many others, which, says he, might have been alledged. We call a Thief taken in the Fact, (*Fur manifestus*, or ἐπι' αὐτοφόρω, *deprehensus*) not only him whom we seize the Moment he has stolen something, but even him whom we find carrying away the Thing stolen, before he arrives at Home, or where he designed to put it. See *Institutes*, *Lib. IV. Tit. I. § 3*. The following is a more express Example. When a Person is adjudged to pay a certain Sum *immediately*, that, say the Lawyers, is to be understood with some Modification; for it is not meant that the Person must go that Moment with the Money, to his House to whom it is to be paid. *Quod dicimus—debere STATIM solvere, cum aliquo scilicet temperamento temporis intelligendum est: Nec enim cum sacco adire debet.* *Digest. Lib. XLVI. Tit. III. De solution. & liberat. &c. Leg. XC.*

7. This is observed by Land also, as appears from *THUANUS*'s History, on the Year 1595, *Lib. CXIII.* where we find, that the Town of *Liere* in *Brabant*, having been taken and retaken the same Day, the Plunder taken from the Inhabitants was returned them, because it had not been twenty-four Hours in the Enemy's Hands. This Custom is derived from the antient Laws of *Germany*, and was established in Imitation of the four and twenty Hours, which, not without Reason, was the limited Time, in Respect to the Permission of taking a Beast wounded by another. See *Lex Longobard* *Lib. I. Tit. XXII. § 6*. The same Thing is observed in *England*, and in the Kingdom of *Castile*, as *ALBERICUS GENTILIS* informs us, *Hispanic. Advoc. I. 3. GROTIUS.*

It has been observed, that this Rule of twenty-four Hours was changed in Part,

IV. *When Lands are said to be acquired.*

^a *Com* [[sic: *Corn*]]. *a Lapide in Gen. c. 14. Molina. disp. 118.*

IV. 1. But ^a Lands are not said to be taken as soon as they are seized on; for tho' it be true, that that Part of the Country, (as ¹ *Celsus* observes) which the Enemy with a strong Army has entered, is for that Time possessed by them; yet every Possession is not sufficient for the Effect which we are now treating of, but such a one as is durable only: Therefore the *Romans* were so far from thinking that Part of Land without the Gate to be entirely lost, whereon *Hannibal* encamped, ² that at that very Time they sold it as dear as before. That Land then is reputed lost, which is so secured with Fortifications, which without being forced cannot be repossessed by the first Owner.

2. And this Derivation of the Word *Territory* given by *Siculus Flaccus*, ³ *à terrendis Hostibus*, from terrifying the Enemy, seems as probable as that of *Varro*; ⁴ *à terendo*, from treading upon; or that of ⁵ *Frontinus*, *à*

in Regard to the *United Provinces*, since the Publication of our Author's Work; and a Placart (of *March 11, 1632.*) is cited, which, abrogating the antient Laws, adjudges to those who retake a Ship from the Enemy, two Thirds of it, and of the Cargo, without any Regard had to the Time that the Vessel was in the Enemy's Hands; provided it was not carried into any Place under their Dominion. See *SIMON DE GROENEWEGEN, De Legibus abrogatis & inusitatis in Hollandia vicinisque regionibus, upon Law II. of the Title, De Captivis & Postliminio, of the Digest. p. 301. Edit. Noviomag. 1664.*

IV. (1) *Rursum, si cum magna vi, &c. Digest. Lib. XLI. Tit. II. De adquir. vel amittenda possessione, Leg. XVIII.*

2. *Hannibal* was informed of this by a Prisoner, and thought it such a Piece of Assurance, that to brave the *Romans* in his Turn, he caused the Goldsmiths Shops round the *Forum* of *Rome* to be sold by Auction: *Parva autem [res minuit spem Annibalis] quod per eos, &c. LIVY, Lib. XXVI. Cap. XI. Num. 6.* The Remark upon the preceding Paragraph, *Note 1.* is also applicable in this Place.

3. The Sense of *FLACCUS* is, that the People, who went out to settle in some Country, called the Extent of Land, which they had seized for their Use, after having terrified and expelled the Inhabitants, *Territory: Praemensumque quod universis, &c. p. 3. Edit. Goes.*

4. *VARRO* says, *Ab eo coloneis locus communis, qui prope oppidum, relinquitur, Territorium, quod maxime teritur. Lib. IV. p. 9. Edit. H. Steph.* The Lawyer *POMPONIUS* derives it from the same Word as *SICULUS FLACCUS*, but for a different Reason; that is, says he, the Power of the Magistrates to awe the People. [*Territorium est universitas agrorum intra fines cujusque civitatis: Quod ab eo dictum quidam aiunt, quod Magistratus ejus loci intra eos fines terrendi, id est, submovendi, jus habent. Digest. Lib. L. Tit. XVI. De verborum significat. Leg. CCXXXIX. §. 8.] GROTIUS.*

5. *FRONTINUS* does not derive the Etymology of the Word *Territory* from *Terra*,

terrâ, from the Earth; or that of *Pomponius* the Lawyer, à *terrendi jure*, from that Power to terrify which the Magistrates have. Thus *Xenophon*, in his Book concerning Tributes, says, that the Possession of Lands is held in Time of War by Fortifications, which he himself calls ⁶ *Τείκη, καὶ ἐρύματα*, *Walls and Retrenchments*.

V. This is also plain, that before the Right of War can entitle us to any Thing taken, it is requisite that our Enemy had first the true Propriety of it; for what Things may be within the Enemy's Towns, or other Places whereof he is Master, the Owners thereof being neither Subjects to our Enemy, nor animated with the same Spirit ¹ as he against us, cannot be

V. Things not our Enemy's are not to be acquired by War.

but from *Terrere*, with *SICULUS FLACCUS*, and that in a Manner more conformable to the Sense and End of our Author. *Territorium*, says he, *est quidquid hostes terrendi causa constitutum est*; or, as *MR. VANDER GOES* conjectures, *Quo quid hostis, &c.* *De limitibus agrorum*, p. 42. But it is a modern Civilian, the great *CUJAS*, who says in a Note upon the *Codex*, Lib. X. Tit. XXXI. *De Decurionib. &c.* Leg. LIII. *Territorium a terra malo deducere, quam a terrendo*: And gives for his Reason, that *Territorium* is sometimes taken for a private Possession, and to the Laws he cites, a Passage from *SICULUS FLACCUS* himself may be added, p. 42. which *MR. VANDER GOES* notes in his Index. This Etymology, as it is the most simple, seems to me the best; tho' the learned *GRONOVIVS* approves that of *POMPONIUS*, in a Note upon this Passage of our Author, which the Reader may see. For the Rest, the Thing is not very material, and the Arguments deduced from the Etymology of Words are often very slender. But it is not improper to apprise my Reader, that I find here another Instance of what I have remarked in several other Places, that our Author sometimes quoted upon the Authority of others; for if he here ascribes to an antient Author the Conjecture of a modern Civilian, that undoubtedly proceeds from his having read in *DENNIS GODEFROY'S* Note upon the Law of the *Digest*, cited in the foregoing Note, the following Words, *A terrendis hostibus* [etymon deducit] *Frontinus in libro de agrorum qualitat. a terra, Cujac. ad L. 53. C. de Decurion.* he believed, through Mistake, that the Words *a terra* related to the Author first spoken of, and not to the latter. We have seen above, in *B. II. Chap. XVIII. § 1. Note 2.* a like Oversight into which he fell on Occasion of a Note of the same *DENNIS GODEFROY*.

6. He speaks of two fortified Places that the *Athenians* had near their Silver-Mines, by the Means of which, with the Addition of a third Fort, which they might build upon an Eminence, it would not be difficult for them to preserve their Mines in Time of War. *Lib. De Reditibus*, Cap. IV. 43, 44. *Edit. Oxon.*

V. (1) That is to say, if neutral Strangers supply our Enemy with any Thing, and that with Design to put him into a Condition to distress us, they may then be considered as being of our Enemy's Party, and, in Consequence, their Effects are liable

acquired by the Right of War; as is <584> proved, among others, by the Saying of ² *Aeschines*, that *Amphipolis* being a City belonging to the *Athenians*, could not be appropriated by King *Philip* to himself, in a War which he made with the *Amphipolitans*. And indeed there is no Reason that ³ authorises us to take the Goods of those who are not of our Enemy's Party, under Pretence that they are found in his Country; and the Change of Master by Force, is too odious to admit any Extension.

VI. *What of Things found in Enemies Ships.*

VI. Wherefore the common Saying, ¹ that Goods found in our Enemies Ships are reputed theirs, is not so to be understood, as if it were a constant

to be taken by the Right of War. Now as this can scarce take Place but in Relation to moveable Things, as the late Mr. COCCEIUS observes, in his Dissertation, *De jure belli in amicos*, § 36. that Civilian might have spared himself the Trouble of criticising our Author, as not having distinguished in this Place between immoveable and moveable Things. The Distinction follows from the very Nature of the Thing which our Author lays down.

2. *Orat. de male obita Legat.* p. 251. B.

3. A Commentator upon our Author opposes him here with an Argument *ad hominem*. If, according to your Opinion, says he, it is lawful to kill the Strangers we find upon an Enemy's Lands, there is much more Reason to hold it lawful to seize their Effects. And as he rightly foresaw, that he might be answered from what has been said above, (*Chap.* IV. of this Book, § 6.) that there is something to be feared from the Persons, but nothing from the Effects, of Strangers, who are not in the Enemy's Country; he replies, that the Effects of Strangers serve to encourage the Enemy, and confirm him in his Designs. But some have answered, that Effects being only the Accessory of Persons, cannot be taken by the Right of War, unless when those they belong to, are, or may be, deemed our Enemies. So that the Use which the Enemy may make of the Effects of others in his Territories against us, authorises us to repute them good Prize, only when they have been sent thither on Purpose to succour him, or when the Proprietors, tho' timely warned, have omitted to withdraw them. See HENNINGES and OBRECHT.

VI. (1) Neither do the Ships of Friends become lawful Prize, on the Account of the Enemies Goods, unless it is done by the Consent of the Owners of the Ship, L. *Cotem. D. De publicanis*. RODERICUS ZUARIUS, *Lib. De usu Maris*, Consil. II. Num. 6. And so I take the Laws of *France* should be understood, which made Prize of the Ships on Account of the Goods, and of the Goods on Account of the Ships; such as those of *Francis I.* made in the Year 1543. *Cap.* XLII. *Henry III.* in the Year 1584. in the Month of *March*, *Cap.* LXIX. the Law of *Portugal*, B. I. Tit. XVIII. otherwise the Goods only are made Prize. *Meursius Danic.* B. II. So in the War between the *Venetians* and *Genoese*, the Ships of the *Grecians* were searched, and the Enemies

and invariable Law of the Right of Nations, but a Maxim, the Sense of which amounts only to this, that it is commonly presumed, in such a Case, the Whole belongs to one and the same Master: A Presumption however, which, by evident Proofs to the contrary, may be taken off. And so it was formerly adjudged in *Holland*, in a full Assembly of the sovereign Court, during the War with the *Hanse* Towns, in the Year 1338, and from thence hath passed into a Law.

VII. 1. But this is certain, if we only respect the Law of Nations, what we take from our Enemies, cannot be claimed by those from whom our Enemies before had taken them by Right of War; because the Law of Nations¹ had first made our Enemies Proprietors of them by an outward Right, and then us. By which Right, among others, *Jeptha* defends himself against the *Ammonites*, (Judges xi. 23, 24, 27.) because the Land in Dispute was taken from the *Ammonites*; as also another Part of the Land from the *Moabites*, by the *Amorites*, by the Right of War; and from them by the same Right, by the *Hebrews*.² So *David* challenges, and divides as his own, the Spoils which he had taken from the *Amalekites*, and they before from the *Philistines*. (1 Sam. xxx. 18. & seq.)

VII. *Things taken from our Enemies are ours by the Law of Nations, tho' they took them from others.*

2. *Titus Largius*, (as *Dionysius*³ *Halicarnassensis* relates it) thus gave his Opinion in the *Roman Senate*,⁴ when the *Volscians* laid Claim to some Lands which the *Romans* had won by the Right of War, because they had been formerly theirs, *We Romans account the Possessions won*

taken out, if any were there. GREGORAS, *B. IX.* See also CRANTZIUS, *Saxon. II.* and ALBERICK GENTILIS, *Advocat. Hispan. I. 20.* GROTIUS.

VII. (1) See Note 2. upon Paragraph I. of this Chapter.

2. So *Rezin*, King of *Syria*, having taken the City *Eloth*, which had belonged to the *Idumaeans*, gave it to be inhabited, not by the *Idumaeans* but the *Syrians*, according to the Reading of the *Masoreths*. 2 Kings xvi. 6. GROTIUS.

But that Reading is faulty. See Mr. LE CLERC's Commentary upon the Text.

3. *Lib. VI. Cap. XXXVI. p. 355. Edit. Oxon. 369. Sylburg.*

4. PLUTARCH relating in what Manner the *Veii* had commenced Hostilities against the *Romans*, under Pretext that the latter had refused to restore the City of *Fidenae*, to which they pretended to have a Right; observes, that this was both unjust and ridiculous, because the *Veii* had not defended *Fidenae*, and had suffered the *Romans* to make a Conquest of it. *Vit. Romul. (p. 33. B. Vol. I. Edit. Wech.)* GROTIUS.

by the Sword most just and honest; neither can we be persuaded by a foolish Easiness, to destroy the Monuments of our Valour, <585> by returning them to those that lost them. Nay, those very Lands we ought not only to communicate to those Citizens now alive, but to leave them to our Posterity, instead of parting with what we have, and treating ourselves like Enemies. This also is plain from the Answer the Romans gave the Aurunci, ⁵ We Romans think it just, that whatsoever a Man wins by his Valour from his Enemies, he may leave to his Children, as being his own by a very good Title. In another Place, the Romans answer the ⁶ Volsci thus, But we account those our best Estates which we conquer from our Enemy; since they are ours, not by our own Laws, but a Law derived rather from the Gods than Men, and allowed by the constant Practice of all Nations, both Greeks and Barbarians; we shall therefore yield up nothing cowardly of what we have purchased valiantly; for it would be a great Disgrace to us, if either through Fear or Folly we should quit what we have won by Bravery and Valour. So in the Answer of the Samnites, ⁷ We have gained this by War, which Law of Acquisition is the justest.

3. Livy, speaking of Land near Luna, divided by the Romans, says, ⁸ That Land had been taken from the Ligurians, and it had been the Hertrurians before it was the Ligurians. By this Right the Romans held Syria,

5. DIONYSIUS HALICARNASSENSIS, *Antiq. Rom.* Lib. VI. Cap. XXXII. (p. 352. *Edit. Oxon.* 366. *Sylb.*) This Example is not to the Purpose. The Romans having overcome the Volsci Ecetrani, and deprived them of their Lands, the Volsci Aurunci demanded their being restored to them.

6. DIONYSIUS HALICARNASSENSIS, *Lib. VIII. Cap. X. p. 470. Edit. Oxon.* (488. *Sylb.*) The Volsci demanded only the Lands and Towns which the Romans themselves had taken from them. So that this is also an Example *extra oleas*.

7. *Excerpt. Legat.* (Cap. II. p. 705.)

Of all these Examples there is not one which agrees with the Case in Question. The Volsci demanded Restitution of Lands, which the Romans had taken from themselves. DIONYSIUS HALICARNASSENSIS, *Lib. VI. Cap. XXXIV. Fregellae* was a City of the Volscians which had been taken and demolished by the Samnites. The Romans rebuilt it, and settled a Colony in it. See LIVY, *Lib. VIII. Cap. XXIII. Num. 6.* This occasioned the Complaint of the Samnites. The Affair of *Fidenae* is evidently foreign to the Subject. We do not find in all these Instances any Thing taken from an Enemy, who had before taken it from others by the Right of War.

8. *Et Lunam coloniam eodem anno, &c.* LIVY, *Lib. XLI. Cap. XVII. Num. 4, 5, 6.*

as ⁹ *Appion* observes, not restoring it to *Antiochus Pius*, from whom *Tigranes*, an Enemy to the *Romans*, had taken it; and *Justin*, out of *Trogus*, brings in *Pompey* returning this Answer to the same *Antiochus*, ¹⁰ *As he took not the Kingdom from him whilst he was in Possession of it, so neither would he, after he had yielded up his Right to Tigranes, restore to him a Kingdom which he could not keep.* So those Parts of *Gallia* which the *Cimbri* had taken from the *Gauls*, ¹¹ the *Romans* afterwards taking, ¹² held as their own.

VIII. But here is a more difficult Question, to whom do the Spoils taken from the Enemy in a publick and solemn War belong, whether to the People in general, or to private Persons, of and among ¹ the People? The modern Expositors of the Law here vary very much in their Opinions; for most of them finding ² in the *Roman Law*, ² that the Things taken become the Captors; and in the *Canon Law*, ³ that the Spoils are to be divided by publick Determination, do say, one after another, (as is usual) that tho' principally, and by original Right, the Captor has the best Title to them, yet they are to be brought to the General, and he is to <586>

VIII. *That Things taken from the Enemy are not always theirs that take them.*

^a *Bart.* ad leg. 28. *Dig.* de Captiv. & Postlim. *Alexand.* & *Jason* ad leg. 1. *Dig.* de adquir. possess. *Angel.* ad

9. *Bell. Mithridatic.* (p. 404. *Edit. Amstel.* 244. *Edit. H. Steph.*) The same Historian says in another Place, that *Pompey* made this the Pretext for depriving a Prince of his Dominions, of whom the *Roman People* had no Reason to complain. *Bell. Syriac.* (p. 190, 191. *Edit. Amstel.* 119. *H. Steph.*) *Antiochus* himself acknowledges in *POLYBIUS*, *That Conquest is the best of Acquisitions.* Excerpt. Legat. Cap. LXXII. *GROTIUS*.

Our Author confounds here two *Antiochus*'s; for he of whom he speaks in the latter Part of this Note, is not *Antiochus Pius*, but *Antiochus*, surnamed *the Great*.

10. *Igitur ut habenti regnum non ademerit, &c.* Lib. XL. Cap. II. Num. 4.

11. It was after *Marius* had defeated the *Cimbri*, that *Apuleius*, Tribune of the People, proposed the Distribution of those conquered Lands. *APPIAN.* *Bell. Civil.* p. 625. *Edit. Amstel.* (367. *H. Steph.*)

12. The antient *Franks* did not restore to the *Romans* the Lands in *Italy*, surrendered to them by the *Goths*. *PROCOPIUS, Gothic.* Lib. IV. See also what the King of *Sweden* says, in Relation to his Dispute with the *Poles* about *Livonia*. *THUANUS, Lib.* LXXVI. upon the Year 1582. *GROTIUS*.

VIII. (i) As Strangers in the Service of the State.

2. The Law is cited above, § 2. *Note* 20.

3. The Canons on which this is founded, consist of two Passages; the one from *ISIDORUS*, whom we shall cite below after our Author, § 17. *Note* 13. the other from *St. AMBROSE*, who will be also cited, § 23. *Num.* 2. *Note* 8.

Inst. *de rerum
divis.* § 17.
Panorm. ad
Decret. *de Jure-
jur.* c. 29.
Thom. Gramm.
Decis. Neapol.
71. n. 17. *Mar-
tin. Laud.* de
bello, *quaest.* 4.

distribute them among the Soldiers. Which Opinion, not less common than false, I shall take the more Care to confute, that we may see how unsafe it is in such Controversies to rely upon the Authority of those Doctors. There is no Doubt, but the Consent of Nations might have established the one or the other of these two Rules, either, that the Things taken should belong to the People that bear the Charge of the Wars, or to the first Captor; ⁴ but the Question is, what Nations really intended to establish in this Case? And I affirm, that their Intention was, that the Goods of one Enemy, with Respect to another, should be considered as Things ⁵ without a Proprietor; as we have before ⁶ explained, from the Words of *Nerva* the Son.

IX. *That natu-
rally both Pos-
session and
Property may
be acquired by
another.*

IX. 1. The Things that are Nobody's, indeed become the Captor's; but they may be called Captors, who employ others to take them, as well as they who take them themselves. So they who are employed by others to catch Fish, Fowl, Deer, or Pearls; as Slaves, Children not emancipated, and sometimes Freemen, take them for those that employ them. *Mo-*

4. Our Author confounds here different Things: The Question does not relate to the Law of Nations, properly so called; for in whatever Manner that Law is understood, and whatever it be founded on, it ought to regard the Affairs in Dispute between State and State. Now, whether the Booty belongs to the Sovereign who makes War, or the Generals of Armies, or the Troops, or other Persons, that take any Thing from the Enemy, it signifies nothing either to the Enemy or other States. What is taken is taken; and if it be good Prize, it is of very small Consequence to those who have lost it, in whose Hands it remains. As to neutral People, it suffices, that those of them who have bought, or any other Way acquired, a moveable Thing taken in War, cannot be molested, or prosecuted, upon that Account. See above, § 1. *Note* 1. The Truth is, the Regulations and Customs upon this Head are of publick Right. And their Conformity in many Countries implies no more than a civil Right common to several States separately, which our Author distinguishes elsewhere from his Law of Nations. See *B. II. Chap. III. § 5. Num. 2. and Chap. VIII. § 26.*

5. Without supposing any general Consent of Nations in this Place, it suffices to say, that the State of Hostility gives a Right of taking the Things which belong to an Enemy, in the same Manner as if they had no Proprietor, and as if the first Occupant were entitled to them; because the Law which forbids the taking away the Effects of others, ceases between Enemies, merely on Account of their being Enemies.

6. In Paragraph II. of this Chapter, *Num. 3. Note* 23.

destinus ¹ the Lawyer said well, *Whatsoever is naturally gained, as Possession is, we may gain by any one whom we will appoint to do it for us.* And also *Paulus*, ² *We acquire Possession by the Mind, and by the Body; the Mind, I mean our own, but the Body may be either our own or another's.* And in another Place, ³ *Possession may be taken by an Attorney, Guardian, or Trustee; provided it be done with the Design of doing it for us, and in our Name.* So among the *Greeks*, they that overcame in the ⁴ *Olympick Games*, gained the Prizes, not for themselves, but for them that sent them. The Reason is, because one Man may make Use of another, as his Instrument, if both are willing, as we have declared in another Place. (*B. i. Chap. v. § 3.*)

2. Wherefore the Difference put between Freeman ⁵ and Slaves, in Respect to Acquisitions, regards only the Civil Law, and properly belongs to Civil Acquisitions, as appears from the afore-quoted Place of ⁶ *Mo-*

IX. (i) *Quod naturaliter adquiritur, &c.* Digest. Lib. XLI. Tit. I. *De adquir. rerum domin.* Leg. LIII.

2. *Possessionem adquirimus, &c.* Recept. Sentent. Lib. V. Tit. II. *De Usucap.* § 1.

3. *Per Procuratorem, Tutorem, &c.* Digest. Lib. XLI. Tit. II. *De adquir. vel amit. possess.* Leg. I. § 20.

4. See PETER DU FAURE'S *Agonisticon*. Lib. I. Cap. III. p. 14, 15. and *Cap. XXVI.* p. 170. *Ed. Ludg.* 1595. The Example which the learned GRONOVIVS alledges here, does not seem well applied. It is likely that *Alexander*, the Son of *Amyntas*, King of *Macedon*, entered himself as a Combatant in the Olympick Games, since *Justin*, who is quoted, gives this Circumstance as a Proof that Nature had adorned that Prince with every excellent Quality. *Cui [Alexandro] tanta omnium virtutum, &c.* Lib. VII. Cap. II. Num. 14. But the same Commentator adds another Example, very proper here, taken from the *Romans*, amongst whom a Person might obtain the Prize in the Games of the *Circus*, either by himself, or the Slaves he sent thither: *Namque ad certamina in Circum per ludos & ipsi descendebunt, & servus suos quique mittebant, &c.* PLINY, *Hist. Natur.* Lib. XXI. Cap. III.

5. Because, according to the *Roman Law*, Acquisitions were not made for a Man by another, unless that other was under his Power as a Slave, real or supposed, or a Son not emancipated. *Ex his itaque apparet, per liberos homines, &c.* Institut. Lib. II. Cap. IX. *Per quas personas, &c.* § 5.

6. See Note 1. on this Paragraph. The Words there recited are preceded by the following, *Ea, quae civiliter adquiruntur, per eos, qui in potestate nostra sunt, adquirimus, veluti stipulationem: Quod naturaliter, &c.*

destinus. And yet the Emperor *Severus*⁷ brought these afterwards nearer to the Pattern of natural <587> ones; not only for the Good of the Publick, as he himself acknowledges, but also to follow the Rules of Right and Equity; therefore, setting aside the civil Right, that Saying holds true, that what a Man does himself, for himself, he may also do by another, and it is the same Thing⁸ to do it by another as by himself.

X. A Distinction of Actions done in War into publick and private.

X. We must then here distinguish between the Acts which in a War are truly publick, and private Acts, that are done by the Occasion of a publick War.¹ By these private Acts the Goods of an Enemy principally and directly belong to the private Persons, by the other to the People. Upon this Principle of the Right of Nations *Scipio* argues with² *Masinissa*, in *Livy*, *Syphax has been vanquished and taken, by the Conduct of the Romans; therefore he, his Wife, Kingdom, Lands, Towns, and their Inhabitants, and, in a Word, whatsoever belonged to Syphax, is become lawful Prize to the People of Rome*. And thus did *Antiochus* the Great plead, that *Coelo-Syria* did of Right belong to *Seleucus*, and not to *Ptolemy*, for

7. He decreed, that the Possession of a Thing might be acquired by the Means of any free Person, even tho' we did not know that he had taken Possession of it in our Name; so that the Moment we come to know it, the Time of Prescription commenced. *Per liberam personam ignoranti quoque, &c.* Code, *Lib. VII. Tit. XXXII. De adquir. & retin. possess. Leg. I.* See *CUJAS* upon this Law, *Vol. IX. Opp. p. 1049, 1050.* and the *Receptae Sententiae* of *JULIUS PAULUS, Lib. V. Tit. II. § 2.* with *Mr. SCHULTING's* Note, *Jurisprud. Ante-Just.* p. 434. This had been established before *Severus*, by the Decisions of the Civilians. See *JANUS A COSTA*, upon the *Institutes*, *Lib. II. Tit. IX. § 6.* Our Author cited here one Title in the *Codex* for another.

8. These are two Rules in the *Canon Law* quoted in the Margin by our Author, *Potest quis per alium, quod potest facere per seipsum.* Decretal. in VI. *De Reg. Juris, Reg. LXVIII. Qui facit per alium, est perinde, ac si faciat per seipsum.* Reg. LXXXII.

X. (1) This Decision has been criticised not without Reason in my Opinion. Every publick War being made by the Authority of the People, or their supreme Magistrate, all the Right private Persons can have to Things taken from the Enemy, is originally derived from them: The Sovereign's Consent, either express or tacit, is always necessary in this Case. See *ZIEGLER* upon this Place, and *PUFENDORF's Law of Nature and Nations*, *Lib. VIII. Cap. VI. § 18.*

2. *Syphax Populi Romani auspiciis, &c.* *Lib. XXX. Cap. XIV. Num. 9.* Neither this Example, nor the following, have any Thing in them, that tends to establish the Distinction of our Author.

that *Seleucus* maintained the War, to whom *Ptolemy* was but an Assistant, according to *Polybius*, in the fifth Book.

XI. 1. Immoveable Goods are not usually taken, but by some publick Act, as by bringing in an Army, or by planting of Garrisons, therefore, as *Pomponius* decided, ¹ *Lands taken from the Enemy fall to the State*, that is, as he explains it, *Is not Part of the Booty*, ² strictly taken. Thus *Salomo*, a Lieutenant-General, in *Procopius*, ³ *That Prisoners, and all other Moveables, should be a Booty to the Soldiers, is not unreasonable*, (so it be done by publick Grant, as we shall hereafter explain it) *but that the Lands should belong to the Emperor, and the Roman Empire*.

XI. *The Land taken is the People's, or his that maintains the War.*

2. So among the ⁴ *Hebrews* and *Lacedemonians*, ⁵ Land taken in War was divided by Lot: Thus the *Romans* either kept the Lands taken in War to let out, (a small Part of it sometimes being left out of Civility to the

XI. (1) *Verum est, expulsis hostibus, &c.* Digest. Lib. XLIX. Tit. XV. *De Captivis & Postlimin. &c.* Leg. XX.

2. That is, for a Thing which belongs to him who has taken it.

3. *Vandal.* II. See what follows there. Also (the Emperor) *Severus* gave the Lands conquered from the Enemies to the Captains and Soldiers of the Frontier Garrisons, as *LAMPRIIDIUS* observes. In the *Helvetic League* it was stipulated, that the Towns and Forts taken, should belong to the whole Body, as we find in many Places of *Similar*, *De Repub. Helvetiorum.* *GROTIUS*.

4. This is inferred from the Manner, in which the Land of *Canaan* was divided among the *Israelites*, according to the Order which *GOD* himself had given in the Book of *Numbers* xxvi. 55. xxxiii. 54. xxxvi. 2. Our Author observed here in a Note, that among the same *Hebrews*, the King had for his Share of the Lands taken in War, as much as a whole Tribe, and refers to the Title, *De Rege*, of the *Talmud*. See *SELDEN*, *De jure Natur. & Gent. secund. Hebr.* Lib. VI. Cap. XVI. p. 785.

5. I am very much deceived, if our Author, trusting to his Memory, has not confounded the *Lacedaemonians* with the *Athenians*, in this Place. The Scholiast upon *ARISTOPHANES* says, that it was the Custom with the *Athenians*, when they had taken an Enemy's City, and expelled the antient Inhabitants, to distribute the Lands by Lot amongst the Victors. *In Nub.* ver. 203. See the late Baron *SPANHEIM* upon that Passage. Long before him, *THOMAS GATAKER* had cited this Passage, amongst many others, in his *Historical and Theological Treatise upon the Nature and Use of Lots*, writ in *English*, Chap. IV. p. 76. But neither the one nor the other mention the *Lacedaemonians*; tho' the latter, who was a Man of very extensive Reading, made it his Business to collect all he could find upon that Head, in the Customs of the *Greeks, Romans*, and other Nations.

former Owners) or sold them, or assigned them to Colonies, or made them tributary; whereof you may find many Testimonies in Laws, Histories, and Treatises on Surveying. ⁶ *Appian* <588> in his first Book of the Civil War tells us, *When the Romans had conquered Italy, they took away Part of their Lands.* And in his ⁷ second Book, *Having subdued their Enemies, they did not take away all their Lands, but a Part.* And *Cicero* ⁸ observes that their Generals having conquered an Enemy, sometimes consecrated his Lands, but by the Decree of the People.

XII. *Things moveable, either with or without Life, taken by a private Act, are the Captor's.*

XII. 1. But Things moveable, whether with or without Life, are either taken in publick Service, or out of it. If they are not taken in publick Service, ¹ they are the private Captor's. And hither we may refer that of *Celsus*, ² *Whatever among us was the Enemy's, belongs not to the State, but to the prior Occupant.* Whatever is among us, that is, is found with us in the Beginning of the War. For the same was observed of Persons, when they were in this Case considered as Goods taken. There is a remarkable Passage in *Tryphoninus*, to this Purpose, ³ *But they who in Times of Peace*

6. Page 604. *Edit. Amstel.* (353. *H. Steph.*)

7. Page 840. (516. *Edit. H. Steph.*)

8. *Consecrabantar agri, &c.* *Orat. de domo sua ad Pontifices, Cap. XLIX.*

XII. (1) Admitting the Sovereign's express or tacit Consent.

2. *Et quae res hostiles apud nos sunt, &c.* *Digest. Lib. XLI. Tit. 1. De adquir. rerum Domin. Leg. LI.*

3. *Verum in pace, qui pervenerunt ad alteros, si bellum subito exarsisset, eorum servi efficiuntur, apud quos jam hostes suo fato* [as it must be read and not *facto* or *pacto*, as the Editions have it] *deprehenduntur.* *Digest. Lib. XLIX. Tit. XV. De Captivis & Postlimin. &c. Leg. XII. princ.* The Grammarian *SERVIVS* opposes Destiny to Merit, when he says, that *VIRGIL* takes Care, in relating the Adventures of the *Trojans*, to attribute every Thing to the Destinies, and nothing to the Faults of the Exiles. *ACTI FATIS, Si fatis, nulla Junonis invidia est: Si odio Junonis, quomodo acti fatis? Sed hoc ipsum Junonis odium fatale est: Laborat enim VIRGILIUS nil Trojanorum meritis, sed omnia fatis adscribere.* In *Aeneid.* (*ver. 32.*) *GROTIUS.*

The Passage of *NAEVIUS*, which our Author alledges here, by Way of Example, is cited, as *GRONOVIVS* informs us, by the Grammarian *TERENTIANUS*, 2439. *Edit. Putsch.* As to the Correction of the Word *Fato*, it is exactly according to the antient Editions of the Body of Law, and some of the modern ones. Mr. *BYNCKERSHOEK*, who makes the Remark, prefers *facto* however, upon the Authority of the *Florence Manuscript*, and explains the Passage with some small Difference, by changing the

came to dwell in another Country, upon the sudden breaking out of a War, unfortunately become the Slaves of those who are become their Enemies; where we may observe, that the Lawyer attributes this to Fate, because they fell into Bondage, *without any Merit of their own*. For it is common to ascribe such Things to Fate. So that of *Naevius*, *The Metelli were made Consuls of Rome by Fate*, that is, without any Merit of their own.

2. Thus it is, when Soldiers take any Thing from their Enemies when they are not upon Duty, or executing the Commands of their Captain, but doing what any other Person might do, or by a bare Permission, what is thus taken, is lawful Prize to the Captors, because they do not take them as Servants of the Publick. Such are the Spoils taken in a single Combat, and in Excursions, made freely, without Command, into an Enemy's Country, at a Distance from the Army, (ten Miles, according to the *Roman Law*, as we shall see presently) which the *Italians* call *Correria*, and distinguish it from *Bottino*, Booty.

XIII. And whereas we say, that by the Law of Nations, whatsoever is thus gained, becomes directly the Captor's, it is to be so understood, that this was the ¹ Law of Nations, before any Thing was decreed in this Case by the Civil Law. For every State or People may otherwise determine of it among themselves, and prevent the Right of private Men, as we see done in many Places concerning wild Beasts and Fowl. So it may be ordained by Law, that whatsoever Goods of the Enemies are found among us, should be confiscated to the State.

XIII. *Unless the Civil Law otherwise ordain.*

XIV. I. But as to those Things that a Man takes in a military Expedition, the Case is very different. For here every Soldier represents the Body of the State, and executes the Business of the whole political Body: Wherefore (if the Civil Law does not otherwise provide) the State acquires both the Possession and Property of Things taken, which it may transfer to whom it pleases; and because this directly contradicts the common

XIV. *What is taken by a publick Act is the Publick's, or his that maintains the War.*

Punctuation. *Observ. Jur. Roman.* Lib. IV. Cap. XIV. He confesses at the same Time, that *Fato* makes a very good Sense, and indeed the Thing is little important at Bottom.

XIII. (1) See above, § 8. Note 4.

Opinion, I find myself obliged to enlarge upon it more than usual, and to prove it from the Examples of the most celebrated Nations. <589>

2. I shall begin with the *Greeks*, whose Custom *Homer*¹ describes in several Places.

Ἄλλὰ τὰ μὲν πολίων ἐξεπράθομεν, τὰ δέδασται.

The Cities sack'd, the Spoils we did divide.

Achilles, in the same Poet, recounting the Cities which he had taken himself, says,

² Τάων ἐκ πάσεων, &c.

The worthiest Spoils with our own Hands we took,

And rich they were: We bore them instantly

To Agamemnon: He behind the Ships

Divided some; but far the most reserv'd.

For here we must look upon *Agamemnon*, partly as Head of all *Greece* at that Time, and so representing the whole Body of the People, by which Right he divided the Spoil, but with the Advice of his Council; and partly as General, and so out of that which was publick, he claimed a greater Share than others to himself. Therefore *Achilles* thus addresses *Agamemnon*,

³ Οὐ μὲν σοί ποτε ἴσον ἔχω γέρας, &c.

I don't pretend to equal Share with you,

When any Trojan Town we do subdue.

XIV. (i) *Iliad*. Lib. I. ver. 125.

2. *Lib.* IX. ver. 330, & seq.

I cannot help observing here, that Madam DACIER has manifestly changed the Sense of HOMER, in ver. 334, 335. of this Passage, by translating them thus, *Retenoit le reste pour lui, & en faisoit, comme il lui plaisoit, des presens aux Generaux, & aux Princes*. "Reserved the Rest for himself, and made Presents out of it, as he thought fit, to the Princes and Generals." Upon which she supposes, without other Proof, that the King distributed to such as he thought fit to distinguish, all the Booty he had reserved for himself. But the Poet evidently distinguishes the Part *Agamemnon* kept for himself, from that which he took for Presents to the Generals, and the Leaders of the Army; which makes that Portion he left for the Soldiers still the less.

3. *Lib.* I. ver. 163, 164.

And in another Place *Agamemnon*, by the Advice of his Council, ⁴ offers to *Achilles*, a Ship laden with Gold and Silver, and twenty Women, as his Share of the Spoil. When *Troy* was taken, as *Virgil* relates, *Aeneid* ii. ⁵

*There Phoenix and Ulysses watch the Prey,
And thither all the Wealth of Troy convey:
The Spoils which they from ransack'd Houses brought,
And golden Bowls from burning Altars caught:
The Tables of the Gods, the purple Vests,
The People's Treasure, and the Pomp of Priests.* Dryden.

So, long after, ^a *Aristides* faithfully watched the Booty taken at the Battle of *Marathon*. And after the Battle at *Plataeae*, it was strictly forbidden, that any Man should take to himself any Part of the Spoil; and ^b afterwards it was distributed among the People, according to every one's Deserts. The *Athenians* being subdued, ^c *Lysander* brought the Spoil into the publick Domain. And the *Spartans* had publick Offices, called *Λαφυροπῶλαι*, ⁶ appointed to make Portsale of all the Prizes taken in War. <590>

^a *Plut. in ejus Vit.*

^b *Herod. l. 9.*

^c *Plut. in ejus Vit.*

3. If we pass to *Asia*, *Virgil* ⁷ tells us, that the *Trojans* used to divide the Spoil by Lot; as is usual where Things held in common are to be divided among many. Otherwise the General had the dividing the Spoil,

4. *Lib. IX. ver. 279, & seq.*

5. [[Footnote number in text is wrongly printed as part of the reference to the *Aeneid*.]]

Et jam porticibus vacuis, &c.

Aeneid. Lib. II. ver. 761. & seq.

6. See XENOPHON, in his Treatise upon the *Lacedemonian* Government, *Cap. XIII. Num. II. Edit. Oxon.* Our Author observed here, that whilst *Agésilau* was in *Asia*, *Spithridates*, who had come over to his Party, having taken the Camp of *Pharnabazus*, converted the Booty to his own Use; but *Erispides*, the *Lacedemonian*, having caused strict Search to be made on that Account, obliged *Spithridates* to run away. This PLUTARCH relates in the Life of *Agésilau*, p. 601. E.

7. *Si vero capere Italiam, sceptrisque potiri*

Contigerit victori, & praedae ducere sortem, &c.

Aeneid. Lib. IX. ver. 267, 268.

by which Right *Hector*, upon *Dolon's* Request, ^d promised to give him *Achilles's* Horses; whereby we may perceive that this Right of gaining Property was not in the sole taking of the Thing. The Spoil taken in *Asia* was brought to ^e *Cyrus*, being Conqueror, and so afterwards to ^f *Alexander*. If we look into *Africa* we there find the same Custom; so the Things taken at ^g *Agrirentum*, and at the Battle of ^h *Cannae*, and elsewhere, were sent to *Carthage*. Among the old *Franks*, as we find in the History of *Gregorius Turonensis*, whatsoever was taken in War ⁸ was divided by Lot. Neither had the King any other Share than what the Lot gave him.

^d *Homer, Iliad*
10.

^e *Plin. l. 23.*

^{c.} 3.

^f *Plut. in ejus*
Vit. Curt. l. 4.

Diod. l. 17.
Strabo, l. 15.

^g *Diod. l. 13.*

^h *Livy, l. 23.*

4. But by how much the *Romans* exceeded all other Nations in the military Art, so much the more do they deserve our Consideration of the Examples they furnish us with, in Regard to the Subject we are now upon. *Dionysius Halicarnassensis*, a most exact Observer of the *Roman* Customs, thus instructs in this Case, ⁹ *Tà ἐκ τῶν πολεμίων λάφυρα, &c.* *Whatsoever their Valour has taken from the Enemy in War, the Law has decreed to be publick, so that not only the private Soldiers are not Proprietors thereof, but not even the General himself; the Quaestor causes the whole to be sold, and brings the Produce of it into the publick Treasury.* These are the Words of those that accused *Coriolanus*, who, to render him odious, do not express themselves altogether exactly.

8. You have this in *TURONENSIS, B. II. Chap. XXVII. AYMON, Lib. I. Cap. XII.* and in the *Epitome* published by *FREHER, Cap. IX.* This was also an antient Custom of other Nations. *SERVIVS*, upon the third *Aeneid. Sortitus non pertulit ullos. Because the Prisoners and Spoil were divided among the Conquerors by Lot.* And upon *praedae ducere sortem.* See *JOHANNES MAGNUS*, of bestowing the Prey in common, and of clearing by Oath, among the *Swedens* and *Goths*, *Lib. XI. Cap. II. GROTIUS.*

In the Passage of the History of *JOHANNES MAGNUS*, referred to by our Author, there is not a Word upon the Subject for which he quotes it. Nor do I find any Thing said of it, in any other Part of that History, or in that of *OLAUS MAGNUS* his Brother, and Successor in the Archbishoprick of *Upsal*, intitled *Historiae Septentrionalium Gentium Breviarium*; or in the *Historia Suecorum Gothorumque*, of another Historian of the same Name, *ERICUS OLAUS.* I am afraid our Author has mistaken one Name for another in this Place.

9. *Antiq. Roman. Lib. VII. Cap. LXIII. p. 450. Edit. Oxon. (467, 468. Sylburg.)*

XV. For it is true that the People are the Right ^a Owners of the Spoil. ¹ Yet it is as true, that the Power of disposing of it was, in the Times of the Republick, left ² to the General; yet so that he was to give an Account of it to the People. *L. Aemilius* says, in *Livy*, ³ that *Cities taken by the Sword, not those that surrendered, were pillaged; but this at the Will of the General, not of the Soldiers.* Yet this Power, which Custom had bestowed on the Generals, they themselves have sometimes, to take away all Suspicion, referred to the Senate, as *Camillus* ⁴ did; and they that have retained it, are found to have disposed it to several Uses, either for Religion, Reputation, or Ambition.

XV. *Yet in such Things some Power was left to the Will of the General.*

^a See *Simler, De Rep. Helvetior.*

XVI. 1. But they who desired to be, or be thought most upright, ¹ would not at all meddle with the Prey; but whether it were in Money, they ordered the <591> Quaestor of the People to receive it, or other Goods, the Quaestor was commanded to sell them publicly, and the Money

XVI. *Who either brings 'em to the publick Treasury;*

XV. (1) The learned RHABOD HERMAN SCHELIUS, in his Tract *De Praeda*, which is amongst those that follow his Commentary upon HYGINUS and POLYBIUS, *De Castris Romanorum*, (p. 253. & seq. *Edit. Amstel.* 1660.) refutes DIONYSIUS HALICARNASSENSIS in this Place, without mentioning our Author, who long before him had made the same Criticism, and treated historically the Point of Antiquity in Question, better than any Body else, even since, has done.

2. POLYBIUS very much commends the Disinterestedness of *Paulus Aemilius*, who, when he had made himself Master of the whole Kingdom of *Macedonia*, by the Defeat of King *Perseus*, and had full Power to dispose of every Thing as he thought fit, coveted nothing in the least. *Excerpt. Peiresc. De Virtut. & Vit.* (p. 1454. *Edit. Amstd.* [[this reference added by Barbeyrac]]) GROTIUS.

3. *Aemilius* primo resistere, &c. *Lib. XXXVII Cap. XXXII. Num. 12.*

4. *Nec duci* [Camillo] *qui ad Senatum*, &c. *LIVY, Lib. V. Cap. XXII. Num. 1.*

XVI. (1) Thus *Lucius Mummius* filled all *Italy* with the Statues and Pictures he had taken in the Plunder of *Corinth*, none of which were carried to his own House; as the anonymous Author of the Lives of illustrious Men, (supposed to be AURELIUS VICTOR) informs us. *Mummius Corinthum signis tabulisque spoliavit, quibus quum totam implevit Italiam, in domum suam nihil contulit.* (Cap. LX. Num. 3.) PLUTARCH, in the Life of *Paulus Aemilius*, of whom we have spoken, (*Note 2.* upon the preceding Paragraph) says, that his Generosity and Greatness of Soul was highly extolled, because he would not so much as see the Gold and Silver that had been taken from King *Perseus*, but ordered it all to be paid to the Treasurers of the Republick, [the Quaestors.] (p. 270. *Vol. I. Edit. Wechel.*) GROTIUS.

arising from thence (called *Manubiae*, ² Spoils, as *Favorinus* observes, in *Gellius*) was, by the Quaestor, brought into the Treasury; but if the Expedition was such as deserved the Honours of a Triumph, it was first publickly shewed. And ³ *Livy* says of *C. Valerius* the Consul, *There was but a little Spoil (because they had been often plundered, and had secured most of their Goods in Places of Safety); this being publickly sold, the Consul ordered the Quaestors to put the Money into the Treasury.* Pompey did the same, of whom *Velleius* ⁴ records, *He gave the Money that he had taken from Tigranes, as his Custom was, to the Quaestor, and had it registered.* And so *M. Tully*, ⁵ in his Letter to *Salust*, writes of himself, *Besides the Quaestors of the City, that is, the People of Rome, no Man has or shall touch the Prey that I have taken.* And this was generally done in the antient and best Times of the Commonwealth, to which *Plautus* alluding, says thus,

⁶ *Nunc hanc praedam omnem jam ad Quaestorem deferam.*

Now all this Spoil I'll to the Quaestor bring.

And likewise of Prisoners,

⁷ *Quos emi de praeda de Quaestoribus.*

Whom from the Quaestors of the Spoil I bought.

2. But other Generals did without a Quaestor sell the Spoil, and put the Money into the Treasury, as we may gather from ⁸ what follows in

^{2.} *Praeda dicitur corpora ipsa rerum, quae capta sunt: Manubiae vero adpellatae sunt Pecunia a Quaestore ex venditione praedae redacta.* Noct. Attic. Lib. XIII. Cap. XXIV. GROTIUS.

^{3.} *Praedae ex assiduis populationibus, &c.* Lib. IV. Cap. LIII. Num. 10.

^{4.} *Quae omnis [pecunia Tigranis] sicuti Pompejo moris erat, &c.* VELLEJUS PATERCULUS, Lib. II. (Cap. XXXVII.) Pompey generally acted in that Manner, but not always. See the Passage of LUCAN, cited in the next Paragraph. (Num. 7.) GROTIUS.

^{5.} *De praeda mea, praeter Quaestores urbanos, &c.* Lib. II. Epist. ad Famil. XVII. p. 113. Edit. Graev. maj.

^{6.} *Bacchid.* Act. IV. Scen. IX. ver. 152.

^{7.} *Captiv.* Act. I. Scen. II. ver. 1, 2.

^{8.} Where *Decius* says, in accusing *Coriolanus*, that he had neither delivered the Booty to the Quaestor, nor sold it himself, in Order that the Money might be laid up in the publick Treasury: *Antiq. Roman.* Lib. VII. Cap. LXIII.

the Passage of *Dionysius Halicarnassensis*, whom we have cited a little above. So King *Tarquin*, when he had conquered the *Sabins*,^a sent the Prey and Prisoners to *Rome*. So *Romulius* and *Veturius* the Consuls^b sold the Spoil to supply the Treasury, the Army repining at it. But there is nothing more common, than to find in History an Account of the Riches that such or such a General, either by himself or the Quaestor, brought into the Treasury from the Triumphs over *Italy, Africa, Asia, Gaul* and *Spain*: So that it would be needless to heap together a great many Examples. But this is more remarkable, that the Spoil, or Part of it, was sometimes given to the Gods, sometimes to the Soldiers, and sometimes to others. To the Gods were given either the Spoils themselves, as those which *Romulius*^c hung up to *Jupiter Feretrius*, or turned into Money, as^d *Tarquin the Proud* built the Temple of *Jupiter* on the *Tarpeian Hill*, with the Money raised from the Spoils of the City *Pometia*.

^a *Livy*, l. 1.^b *Livy*, l. 3.^c *Dion. Hal.* l. 2.^d *Livy*, l. 1.

XVII. 1. To give the Spoil to the Soldiers, the old *Romans* thought a Sign of Ambition. So *Sextus* the Son of *Tarquin the Proud*, when retired to *Gabii*, is said to have distributed the Prey among the Soldiers,¹ to make himself the more powerful.² *Appius Claudius* in the Senate, declared such Largesses to be new, prodigal, and inconsiderate.

XVII. Or divides them among the Soldiers, and how.

But the Spoil given to the Soldiers is either divided, or left to be pillaged. It may be divided, either instead of Pay,³ or to reward Merit. *Appius Claudius*⁴ <592> was for giving it in lieu of Pay; if it could not

XVII. (1) *Apud milites vero, obeundo pericula, &c. Lib. I. Cap. LIV. Num. 4.*

2. *Altera [sententia] Appii, &c. Idem. Lib. V. Cap. XX. Num. 5.*

3. JOSEPHUS tells us this was practised among the *Hebrews*, B. III. *Antiq. Histor.*

GROTIUS.

Our Author probably infers this from the *Jewish* Historian's saying, that after the Defeat of the *Amalekites*, MOSES gave Rewards to those who had distinguished themselves by their Bravery. *Cap. II. p. 76. Edit. Lips.* He had just spoken of the great Booty made by the *Israelites* in this Victory; but all these Circumstances are not mentioned in that Part of Holy Writ, where the Defeat of the *Amalekites* is related. *Exod. xvii.*

4. In the Words of LIVY, which follow those quoted Note 2. upon this Paragraph, *Si semel nefas ducerent, &c. Lib. V. Cap. XX. Num. 5.*

^a Lib. 10. be sold, and the Money brought into the Treasury. ^a *Polybius* describes exactly the Manner of this Distribution, namely, that one Part of the Army, the Half at the most, was sent out in the Day-Time, ⁵ or in the Night, to fetch in the Spoil, who were ordered to bring all they found into the Camp, that it might be equally divided by the Tribunes, Shares being likewise allowed to them who staid in the Camp (which King *David* ⁶ made a Law among the *Hebrews*, 1 Sam. xxx. 24, 25.) and also to those, who either by Sickness, or because they were sent elsewhere, were then absent.

^b *Livy*, l. 45. 2. Sometimes the Spoil was turned into Money, and that, in lieu of it, ^b was given to the Soldiers, which was often done in Triumphs. The Proportions I find thus, a single Share to a Foot Soldier; a double Share to a ⁷ Centurion or Captain; a treble to a Trooper; sometimes a single ⁸ one to a Foot Soldier, and double to a Trooper; at other Times a Centurion had double the Share of a Foot Soldier, and the Tribune, as also ⁹ a Trooper, quadruple. There was also sometimes Regard had to their

5. *In dies aut vigiliis*, says our Author. This is not very conformable to his Original. It is not likely, that after the taking of a City the Soldiers should be sent out to plunder, during the whole Night. *POLYBIUS* only says, that every Day were drawn out, sometimes a certain Number of Soldiers from the whole Army, in Proportion to the Bigness of the City, and sometimes only so many Standards or Companies. *Lib. X. Cap. XVI. p. 821. Edit. Amstel.* He informs us a little before, that when *Scipio* had taken *New-Carthage* in *Spain*, upon the Approach of Night, he caused the Troops to desist from plundering, and to carry all the Booty already taken into the midst of the publick Market-Place; where a good Guard was posted during the Night. So that this is very contrary to the Manner in which our Author expresses himself in this Place.

6. See *SELDEN, De Jure Nat. & Gent. Secund. Hebr. Lib. VI. Cap. XVI. p. 784, 785.*

7. *Pediti in singulos*, &c. *LIVY, Lib. XLV. Cap. XL. Num. 5.*

8. *Tantaque praeda fuit*, &c. *Idem ibid. Cap. XXXIV. Num. 5.*

9. *APPIANUS ALEXANDRINUS* says a Tribune and Colonel of Horse. *Bell. Civil. Lib. II. (p. 803. Edit. Amst. 491. Edit. H. Steph.) GROTIUS.*

This was the real Partition. I do not know where our Author had what he speaks of in the Text. It is very probable that it arose from a Mistake. He had in View this very Passage, of which his Memory altered the Sense; and he did not remember afterwards, that it had been the Foundation of what he had advanced. He cites also in the Margin, a Passage from *SUETONIUS*, in *CAESAR, Cap. XXXVIII. init.* where according to the best Editions, the Proportion observed in the Distribution of the Spoils, is not mentioned; and admitting the Gloss which had long remained in the

Merit, as *Marcius*, because he had behaved himself gallantly, was particularly rewarded by *Posthumius*, out of the Spoils taken at ¹⁰ *Corioli*.

3. Which Way soever the Spoil was divided, ^c the General ¹¹ was allowed to take to himself *ἐξάιρετον*, *A choice Part*, what he pleased; that is, what he thought was just and reasonable, ¹² which also was sometimes

^c See Leunclav.
Hist. Turc.

Text, the Proportion would be different from all those our Author speaks of. See the last Commentators upon the Place.

10. See LIVY, (*Lib. II. Cap. XXXIII.*) and PLUTARCH, in the Life of *Coriolanus*, (p. 218. A. B. Vol. II. *Edit. Wech.*) GROTIUS.

There is nothing of this in LIVY. But the Reader may see DIONYSIUS HALICARNASSENSIS, *Antiq. Roman.* Lib. VI. Cap. XCIV.

11. There are Authors, who pretend that this Portion of the General's was most commonly called *Manubiae*. The Grammarian ASCONIUS PEDIANUS is of that Number, who says, *Manubiae autem sunt praeda Imperatoris, pro portione de hostibus capta.* (In CICERO, *Verr.* Lib. I. Cap. LIX.) GROTIUS.

See GRONOVIVS's Note upon this Question of Grammar.

12. So *Nestor* had a Woman for his Share

————— *Ἦν οἱ Ἀρχαῖοι*
Ἐξέλον —————

Whom without Lots the Greeks a Present made
To him. Iliad. Lib. XI. ver. 625, 626.

Ulysses says,

Τῶν ἐξαιρέμην Μενεοικέα, πολλὰ δ' ὀπίσσω
Λάγχανον —————

I chose the fair Menecca first; the Rest
I took by Lot. —————

Odyss. Lib. XIV. ver. 232, & seq.

GROTIUS.

I know not by what Authority our Author, without taking the least Notice, has changed the last Passage, and found the proper Name of a Woman in it, instead of an Adjective, very common in HOMER, *Μενεοικέα*, for *μενοεικέα*: This would rather be the Name of a Man; and there is not the least Necessity for any Alteration. *Ulysses* had said, that before the *Trojan* War he had commanded in chief in nine Expeditions by Sea, wherein he had taken to himself by Right of Preciput, *what he thought fit*, after which he had by Lot a further considerable Share.

Πρὶν μὲν γὰρ Τροίης, &c.

granted to others for their <593> Valour. *Euripides*, speaking of the *Trojan Ladies*, says, ¹³

Τοῖς πρώτοισιν ἐξηρημέναι
Στρατοῦ.

The fairest were given to the Princes.

And of *Andromache*, ¹⁴

Καὶ τὴν Ἀχιλλέως ἔλαχε παῖς ἐξαίρετον.

She was a Prize for great Achilles' Son.

Ascanius, in *Virgil*, ¹⁵

*Ipsum illum clypeum cristasque rubentes,
Excipiam sorti.*

*His Arms and nodding Crest,
And Shield, from Chance exempt, shall be thy Share.* Dryden.

Herodotus relates that noble Presents were given to *Pausanias* ¹⁶ after the Battle of *Plataeae*, Women, Horses, Camels, &c. So King *Tullius* ¹⁷ chose *Ocrisia Corniculana* for himself; and *Fabricius*, ¹⁸ in his Oration to *Pyrrhus*, in *Dionysius Halicarnassensis*, speaks thus, *Of the Spoils taken in War, I might have chosen what I pleased for myself.* *Isidore*, ¹⁹ treating

13. *Trad.* ver. 32. & seq.

14. *Ibid.* (ver. 274.)

15. (*Aeneid.* IX. ver. 270, 271.)

16. He had the tenth Part of the whole Booty. *Lib.* IX. *Cap.* LXXX. King *Agamemnon* had *Cassandra* by this Right of Preciput, according to *EURIPIDES*,

Ἐξαίρετόν νυ ἔλαβεν Ἀγαμέμνων ἄναξ.

(*Troad.* ver. 249.) See *THUCYDIDES* upon the Portion of the Booty given in particular to *Demosthenes*, General of the *Athenians*. *Lib.* III. (*Cap.* CXIV. *Edit.* *Oxon.*) *GROTIUS*.

17. It was not *Servius Tullius*, but *Tarquinius Superbus*, for *Ocrisia* was the Mother of the former; as *GRONOVIVS* observes upon this Place. He might have added that our Author's Mistake arose from *Ocrisia's* Husband's being called *Tullius*. See *DIONYSIVS HALICARNASSENSIS*, *Antiq. Rom.* *Lib.* IV. *Cap.* I.

18. *Excerpt.* p. 714. *Edit.* *Oxon.*

19. *Item praedae decisio*, &c. (*ORIGEN.* *Lib.* V. *Cap.* VII.)

of the Right of War, refers to it, *The Distribution of the Spoil, according to the Quality and Services of Persons*; to which he adds, *The Portion of the General. Tarquin the Proud*, according to *Livy*,²⁰ would both enrich himself and gain the Affections of the People with the Spoil. *Servilius*,²¹ in his Oration for *L. Paulus*, said, he might have made himself rich by dividing the Spoil. And some think, that only the General's Part was called *Manubiae*, as *Asconius Pedianus*²² for one.

4. But those Generals are more worthy of Commendation, who, quitting their own Right, have taken nothing of the Prey to themselves, as²³ *Fabricius* just mentioned, *Preferring Glory even to Riches justly acquired*, which he said he did in Imitation of *Valerius Publicola*, and a few others; whom *M. Portius Cato*²⁴ imitated in his *Spanish Victory*, saying, that he would take nothing to himself of the Prey, but barely what he eat and drunk; yet adding, that he did not blame those Generals who made Use of the Advantages allowed them; but as for himself, he had rather rival the best of Men in Virtue, than the richest in Wealth. Next to these are those Generals to be commended, who take to themselves some of the Prey, but moderately, as *Pompey* is praised by *Cato* in *Lucan*,²⁵ who,

————— *Plura retentis*

Intulit —————

Brought into the Treasury more than he kept.

20. *Eaque ipsa causa belli*, &c. *Lib. I. Cap. LVII. Num. 1.*

21. It is not of the General that *SERVILIUS* speaks, but of *Servius Galba*, who complained, that *Paulus Aemilius* had not rewarded his Army by the Distribution of the Spoils, *Quum te praeda partienda*, &c. *LIVY, Lib. XLV. Cap. XXXVII. Num. 10.*

22. See *Note II.* upon this Paragraph.

23. [[The footnote is wrongly numbered 24 in the text.]] This follows the Passage of *DIONYSIUS HALICARNASSENSIS*, cited above, *Note 18.* of this Paragraph. The Emperor *Julian*, as our Author observes in a short Note, proposed the Example of *Fabricius* to himself and his Soldiers, as appears by a Speech ascribed to him by *AMMIANUS MARCELLINUS*, *Lib. XXIV. Cap. III. p. 429. Edit. Vales. Gron.*

24. *PLUTARCH, in Vit. M. Caton. p. 342. A. Vol. I. Edit. Wech.*

25. *Pharsal. Lib. IX. ver. 197, 198. See above, § 16. Note 4.*

5. In dividing the Spoil, they sometimes considered those that were absent, as *Fabius Ambustus*^d ordered, at the taking of *Anxur*; and sometimes for certain Reasons they were omitted that were present, as the Army commanded by²⁶ *Minutius*, when *Cincinnatus* was Dictator.

^d *Livy* l. 4.

6. But what Right the Generals, called *Imperatores*, in the Time of the Commonwealth had, was transferred, after it had been seized on by those who governed absolutely under that Name, to the Lieutenants, (*Magistri Militum*) who, by their Order commanded the Armies. This appears by *Justinian's Code*,²⁷ where it is enacted, that the Commanders of the Army shall not be obliged to put into the List of military Affairs, for which they were accountable, the Donations of Moveables, either with or without Life, which they gave the Soldiers out of the Spoils of the Enemies, whether at the Time and Place of Pillage, or elsewhere.

7. But this Division proved often the Occasion of Slander, as if the Generals by that Means proposed to gain Favour to themselves; with which they charged *Servilius*, *Coriolanus*, and²⁸ *Camillus*, as if they had enriched their Friends and Clients out of the publick Stock. They, on the other Side, alledged, that they had done it for the publick Good,²⁹ *That the Persons who took the Pains being rewarded for their Labour, might with more Courage undertake other Exploits*; which are the Words of *Dionysius Halicarnassensis* on this Subject.

26. This was because it had been upon the Point of being defeated, through the Consul's ill Conduct who commanded, and who, upon that Account became Lieutenant, from Commander in chief. *Carebis*, inquit, [Dictator L. Quintius Cincinnatus] *praedae parte miles, ex eo hoste, cui prope praedae fuisti; & tu, L. Minutii, donec Consularem animum incipias habere, legatus his legionibus praeeris.* *LIVY, Lib. III. Cap. XXIX. Num. 2.*

27. *Simili etiam modo a gestorum absolvimus ordinatione, &c. Lib. VIII. Tit. LIV. De Donation. Leg. XXXVI. § 1.*

28. This Example is not well applied. The Accusation of *Camillus* had another Foundation. See *LIVY*, whom our Author cites in the Margin, *Lib. V. Cap. XX. XXII. XXIII. XXXII.* and *PLUTARCH*, in *Camill.* p. 132, 133.

29. *Lib. VII. Cap. LXIV. Edit. Oxon.* I read *στραγειάς*, instead of *στρατιάς*, in this Passage; according to the Conjecture of *SYLBURG*, which the Authority of a good Manuscript in the Vatican, that Mr. HUDSON had good Reason to follow, renders indisputable.

XVIII. I. I now come to Plundering, which was granted to the Soldiers, either when they went to ravage the Enemy's Country, or after a Battle, or after the taking of a Town, so that upon a Signal given, they might run in immediately, which was rarely granted of old, and yet not without some Examples in those Times. For *Tarquin*^a gave the City *Suessa Pomertia* to be plundered by his Soldiers. So did *Q. Servilius*,^b the Dictator, the Camp of the *Aequi*. *Camillus*,¹ the City of the *Veii*: *Servilius*, the Consul,² the Camp of the *Volsci*. Also *L. Valerius*³ gave License to plunder in the Country of the *Aequi*. So did *Q. Fabius*,^c having routed the *Volsci*, and taken the City *Ecetra*, and several others afterwards. *Paulus*,^d the Consul, having conquered *Perseus*, gave the Spoil of that Prince's Army to his Foot, and that of the Country round about to his Horse. And, by the Decree of the Senate, he gave the Plunder of the⁴ Cities of *Epirus* to his Soldiers.⁵ *Lucullus* having vanquished *Tigranes*, a long

XVIII. Or suffers them to be plundered.

^a *Dion.* l. 4.

^b *Livy.* l. 4.

^c *Dion.* l. 10.

^d *Livy.* l. 45.

XVIII. (1) This was in Consequence of a Resolution of the Senate; for *Camillus* was averse to granting that Permission, as *LIVY* tells us, *Lib. V. Cap. XX.*

2. That Consul did not suffer it to be plundered in the Manner now under Consideration, that is, that every one might keep what he should take; for *DIONYSIUS HALICARNASSENSIS* expressly says, that he caused the Booty to be divided. *Antiq. Rom.* Lib. VI. Cap. XXIX.

3. This Example is dubious. It does not appear that the Army was permitted to plunder in the Manner our Author understands it. See *DIONYSIUS HALICARNASSENSIS*, *Lib. IX. Cap. LV.*

4. Our Author forgot that he had himself cited this Example above, where he speaks of the Distribution of the Booty in certain Proportions, § 17. *Note 8.* For the Fact he relates here is in the same Chapter of *LIVY*, *Senatum praedam Epiri civitatum, quae ad Persea defecissent exercitui dedisse.* Lib. XLV. Cap. XXXIV. Num. 1. The Example, which he adds here in a little Note, is more to the Purpose; it is that of the Plundering of *Athens* by *Sylla's* Army, as *APPIANUS ALEXANDRINUS* informs us, *De Bell. Mithridat.* p. 331. *Edit. Amstel.* (195. *H. Steph.*)

5. See *APPIANUS ALEXANDRINUS*, *De Bell. Mithrid.* *PLUTARCH* relates, that he gave the Plunder of *Tigranocerta* to his Soldiers; besides, out of the Spoils, 800 Drachmas given to each. *Severus* gave the Spoil of *Ctesiphon* to his Army: He also ordered the Tribunes and Captains, and the very Soldiers to keep to themselves what they got in the Streets, according to *AELIUS SPARTIANUS*. *Mahomet II.* promised both the Spoil of *Constantinople*, and the Slaves, to his Soldiers. *GROTIUS.*

Our Author confounds here two *Roman* Emperors, through the Resemblance of their Names. The first Thing he says of *Severus*, that is to say, of *Septimius Severus*, does really agree to him, and is related by the Historian he quotes; tho' it does not appear very clearly, whether this Emperor left to every Soldier what he had taken, or

while forbad his Soldiers plunder-< 595 >ing, but at last, being assured of the Victory, he gave them Leave to do it. *Cicero*, ⁶ in his first Book of Invention, among the Methods of ⁷ acquiring a Right of Propriety, puts the taking of the Enemies Effects, which have not been publickly sold.

2. They who do not like this Custom, say, that by this License to plunder, ^c the greedy Soldiers often hinder the truly Valiant of the just Reward of their Bravery; and that *We frequently see the backwardest to fight the most forward to plunder; whilst the most courageous expect only the largest Share of Labour and Danger*, which are the Words of *Appius*, in *Livy*. ⁸ To which let us add that of *Cyrus*, in *Xenophon*,

^c See a Passage of *Procopius*, which shall be cited on § 24. n. II.

divided the Booty according to Custom. *Harum adpellationum causa donativum militibus largissimum dedit, concessâ omni* praeda oppidi Parthici; quod milites quaerebant. SPARTIANUS, in *Septim. Sever.* Cap. XVI. But the other Circumstance is told of *Alexander Severus*, by LAMPRIIDIUS, who speaks of the Spoils taken from the *Persians: Et de Praeda, quam Persis diripuit, suum ditavit exercitum; quum & Tribunos ea quae per vicos diripuerant, & duces, & ipsos milites, habere jussisset.* Cap. LV.

6. He gives the Omission of this Manner of acquiring Property, as an Example of an imperfect Enumeration, which an Orator would make in saying to a Person, "As you possess this Horse, you must either have bought, inherited, had him given you, bred him yourself, or stoln him. Now you neither bought, inherited, had him given you, &c. therefore you stole him." He should have added, says CICERO, that this Horse might have been taken from the Enemy, and left out of the Number of Things to be sold for the Benefit of the Publick. *Praeteritur quiddam in ejusmodi enumerationibus: Quoniam habes istum equum, aut emeris oportet, &c.* De Invention. Lib. I. Cap. XLIX.

7. VARRO reckons six Ways by which one may become a lawful Master. 1. Entrance on a just Inheritance. 2. Selling before Witnesses. 3. Giving up Right. 4. Long Possession, or Prescription. 5. Selling for Slaves out of a Booty. 6. By a publick Auction of the Goods of any one. *De re Rust.* Lib. II. Cap. X. GROTIUS.

See upon this Passage WILHELMII GOESII, *Vindiciae pro recepta de mutui alienatione sententia*, p. 66. & seq. and Mr. SCHULTING's Notes upon the *Institutions* of CAJUS, Lib. I. Tit. VI. § 3. p. 53. Col. A. *De Jurisprud. Ante-Justiniana.*

8. *Non avidas in direptiones manus otiosorum urbanorum praerepturas fortium bel-latorum praemia esse: Quum ita ferme eveniat, ut qui signior sit, praedetur, at fortissimus quisque labores periculique praecipuam petere partem soleat.* Lib. V. Cap. XX. Num. 6. I recite the Passage after our Author, who corrects without saying any Thing, and as he understands it, the Editions published in his Time; whereas, in the most antient Editions, and the best Manuscripts, which J. FREDERICK GRONOVIVS follows, there is, *Ut signior sit praedator, ut quisque laboris, &c.* The Sense however is not very dif-

⁹ ἐν τῇ ἀρπαγῇ εὖ οἶδ' ὅτε οἱ πονηρότατοι πλεονεκτήσειαν ἂν, *In plundering I know the worst Soldiers get most.* To this it is alledged, on the other Side, what a Man takes from the Enemy with his own Hand, is more dear ¹⁰ and pleasing to him than much more bestowed upon him by the Order of another.

3. Sometimes also Plundering is granted, because it cannot well be hindered; as it was at the taking of *Cortuosa*, a Town of the *Hetrurians*, according to *Livy*. ¹¹ *The Tribunes ordered the Spoil to be sold, but the Command was too late for the Purpose, for the Soldiers had already seized on it, and it could not be taken away without Envy.* We also read, that the Camp of the *Gallo-Greeks* ¹² was plundered by the Army of *C. Helvius*, against the Will of the General.

XIX. What I said, that sometimes others who were no Soldiers partook of the Spoil, or of the Money arising from the Sale of it; this happened commonly when some had contributed to the Maintenance of the War, and were to be ¹ reimbursed. And sometimes Plays were instituted out of the Money of the Spoil. <596>

XIX. Or gives them to others.

XX. I. Neither is the Spoil diversly disposed of, only when the Wars are divers; but the same Prey, in the same War, is often appropriated to several Uses, distinguished either by its Parts or its Kinds. So *Camillus*

XX. Or dividing them into Parts, disposeth of some one way, some another, and how.

ferent; for those Words, read in this Manner, signify, that the Soldiers who endeavour to have the greatest Share in Fatigues and Dangers, are the last in running after Plunder; which sufficiently implies, that the least brave are, on the contrary, the most keen in Quest of Spoils. See the Note of that great Critick.

9. *De Instit. Cyr.* Lib. VII. Cap. XI. § 4. *Edit. Oxon.*

10. *Gratius id fore, laetiusque*, &c. *LIVY*, Lib. V. Cap. XX. Num. 8.

11. *Publicari praedam Tribunis placebat*, &c. *Lib. VI. Cap. IV. Num. II.*

12. *Nec continere suos*, &c. *Idem. Lib. XXXVIII. Cap. XXIII. Num. 4.*

XIX. (1) Thus the Consuls *Menenius Agrippa*, and *Postumius Tubertus*, having overthrown the *Sabines*, sold the Prisoners, and out of the Money raised in that Manner, reimbursed those who had contributed to the Support of the Army. *DIONYSIUS HALICARNASSENSIS, Antiq. Rom.* Lib. V. Cap. XLVII. p. 300. *Edit. Oxon.* (313. *Syllb.*) Which Passage our Author had in View in the marginal Citation, where he quoted only the Book.

^a *Livy*, l. 5. ^a dedicated the Tenth of the Spoil to ¹ *Apollo Pythius*, in Imitation of the *Greeks*, who first learnt it of the *Hebrews*; at which Time, under the Vow of tithing the Spoil, the Chief-Priests adjudged, that not only Moveables, but also Towns and Fields, were included. The same *Camillus* having vanquished the *Falisci*, delivered the greatest Part of

^b *Ibid.* the Spoil to the Quaestor, and ^b reserved a small Part for the Soldiers. So did also *L. Manlius*, ² *Either sell the Spoil which he brought into the publick Treasury, or divided it among the Soldiers, as equally as possible:* Which are the Words of *Livy*.

2. The Kinds into which a Prey may be divided are these: Prisoners of War, Herds, Flocks, (called properly in *Greek* λεία, the Prey) Money, and other Moveables, both rich and ordinary. ³ *Q. Fabius* having overcome the *Volsci*, ordered the Prey and Spoils to be sold by the Quaestor; but the Silver he brought himself into the publick Treasury. And when

^c *Dion.* l. 10. he had subdued the *Volsci* and *Aequi*, ^c he gave the Prisoners, excepting those of *Tusculum*, to the Soldiers; and in the Lands of *Ecetra*, he left the Persons and Cattle to be plundered. When *L. Cornelius* took *Antium*,

^d *Ibid.* ^d he brought all the Gold, Silver, and Brass into the Treasury; sold the Prisoners, and the Prey, by the Quaestor, and left to the Soldiers the

^e *Ibid.* Provisions and Cloaths. Not unlike to this was that of *Cincinnatus*, ^e who having taken *Corbio*, a Town of the *Aequi*, sent the richest of the Spoil to *Rome*, the Rest he divided to the Soldiers by Companies. *Camillus*, upon taking *Veii*,

^f *Livy*, l. 5. ^f brought nothing into the Treasury, but the Money arising from the Sale of the Prisoners, and having conquered

^g *Id.* l. 6. the *Hetrurians*, he sold the Prisoners, and out of that Money repaid ^g the *Roman* Ladies what they had contributed to the War, and laid up three golden Cups in the Capitol. And when *Cossus* was Dictator, all

^h *Id.* *ibid.* the Prey from the *Volsci*, except free Persons, was given ^h to the Soldiers.

XX. (1) See above, § I. Note 3.

2. *Consul* (Cnaeus Manlius) *armis hostium*, &c. *LIVY*, *Lib.* XXXVIII. *Cap.* XXIII. *Num.* 10.

3. DIONYSIUS HALICARNASSENSIS, *Antiq. Rom.* *Lib.* VIII. *Cap.* LXXXII. p. 526. *Edit. Oxon.* (549. *Edit. Syll.*) The Word λεία in this Passage, includes only Cattle; since the Prisoners are distinguished from it.

3. *Fabricius* having conquered the *Lucans*, the *Bruttii*, and the *Samnites*,⁴ enriched his Soldiers, restored to the Citizens what they had contributed to the War, and brought 400 Talents into the Treasury. *Q. Fabius* and *Appius Claudius* havingⁱ taken *Hanno's* Camp, sold the Prey, and divided it, rewarding those that had done signal Services. *Scipio* at the taking of *Carthage*,^k gave his Soldiers the Plunder of the City, except the Gold, the Silver, and the Things consecrated to the Gods. *Acilius* having taken *Lamia*,^l divided Part of the Spoil (among his Soldiers) and sold the Rest. *Cn. Manlius* having vanquished the *Gallo-Greeks*, and according to the Superstition of *Rome*, burnt their Arms, he ordered every one to bring in what he had taken; of which he sold a Part, that is, what was to come to the Publick; and divided the Rest amongst the Soldiers as equally as possible.

ⁱ *Id.* l. 25.

^k *App. Pun.*

^l *Livy*, l. 37.

XXI. 1. From what we have said, it appears, that no less among the *Romans*, than other Nations, the Spoil belonged to the People; but the Disposing of it was sometimes left to the Generals; yet so, (as I said before) they were to give an Account of it to the People; which we may learn among others, from the Example of¹ *L. Scipio*, who, according to *Valerius Maximus*, was condemned of wronging the Publick, as having received six Pounds of Gold, and 480 Pounds of Silver, more than he had brought into the Treasury; and of others whom I have mentioned before.

XXI. Sometimes the Publick cheated of the Spoil.

2. *M. Cato*, in his Oration concerning the Spoil, did (as *Gellius* observes) in strong and noble Terms complain of the Licence granted to their Generals, and <597> their Impunity for cheating the Publick. Of

4. Which *DIONYSIUS HALICARNASSENSIS* makes *Fabricius* himself say, *Excerpt.* p. 714. *Edit. Oxon.* Our Author added here, in a Note, that *Fabius Maximus*, after having taken *Tarentum*, distributed the whole Booty to his Soldiers, and brought only the Money that arose from the Sale of Prisoners, to the publick Treasury. But *LIVY*, *Lib.* XXVII. *Cap.* XVI. *Num.* 7. And *PLUTARCH*, *Vit. Fab.* p. 187. C. relate the Fact in a different Manner. I suspect that our Author has confounded what the first of those Historians says of *Fabius*, with what he relates a little lower of *Scipio*, the Conqueror of *Asdrubal*. *Scipio, castris hostium potitus, quum praeter libera capita, omnem praedam militibus concessisset, &c. Cap.* XIX. *Num.* 2.

XXI. (1) *Scipio* & *A. Hostilius* legatus, &c. *LIVY*, *Lib.* XXXVIII. *Cap.* LV. *Num.* 6.

which Oration there remains this Fragment, ² *Those who rob a private Person are condemned to be laid in Irons for Life; but the Robbers of the Publick live in Magnificence, we see nothing but Gold and Purple in their Houses.* And again, ³ *That he admired how any Man durst set up in his House Statues taken in War, as if they were so much Furniture.* Thus did Cicero ⁴ exaggerate the Crime of Verres, in defrauding the Publick, because he had stoln a Statue, and that taken out of the Prey of the Enemy.

3. Neither were Generals only, but also private Soldiers, accused of this Crime of robbing the Publick, if they did not produce what they had taken. For they were all, as Polybius ⁵ says, bound by an Oath, *That they should carry off nothing of the Prey, but honestly keep their Faith, as they had sworn.* To which we may refer the Form of the Oath in Gellius, ⁶ by which the Soldier is obliged to take away nothing within the Army, or ten Miles round, that was of more Value than two Pence Halfpeny; or if he took it, to bring it to the Consul, or within three Days declare it publickly. Hence we may understand the Meaning of Modestinus, ⁷ *He that hath stolen away the Spoil taken from the Enemy, is guilty of wronging the Publick.* Which one Passage is enough to convince the modern Interpreters, that the Spoils taken from the Enemy do not peculiarly belong to the Captors; for it is plain there can be no robbing the State, but in Things publick, sacred, or religious. The Design of all this is to shew, (as I said before) that setting aside the Civil Law, and primarily,

2. *Sed enim M. Cato, in oratione—Fures, inquit, privatorum furtorum in nervo atque in compedibus aetatem agunt; fures publici, in auro atque in purpura. Noct. Attic. Lib. XI. Cap. XVIII.*

3. *Cato Censorius—Miror audere, &c. Apud PRISCIANUM, Lib. VII. in fin. p. 275. Edit. Basil. 1568.*

4. It was a Statue of Mercury, which Scipio had found long before, amongst the Spoils of the City of Carthage, and had made a Present to the City of Tyndaris. *Est peculatus [crimen] quod publicè Populi Romani signum, &c. In Verr. Lib. IV. Cap. XLI.*

5. *Lib. X. Cap. XVI. p. 822. Edit. Amstel.*

6. *Item in Libro ejusdem CINCII, de Re Militari, &c. Noct. Attic. Lib. XVI. Cap. IV. See the Dissertation of SCHELIUS, De Sacramentis militum, annexed to his Commentary, De Castris Romanorum, p. 184. & seqq.*

7. *Is, qui praedam ab hostibus captam subripuit, peculatus tenetur, & in quadruplum damnatur. Digest. Lib. XLVIII. Tit. XIII. Ad. Leg. Jul. peculatus, &c. Leg. XIII.*

whatsoever is taken from the Enemy, in any military Expedition, belongs to the Prince or People who maintain the War.

XXII. 1. We added, *Setting aside the Civil Law, and primarily, or directly:* The first, because the Law, whether made by the People, as among the *Romans*, or by the King, as among the *Hebrews* and others, may dispose of Things not actually possess, to the Benefit of the State. And here, under the Notion of Law, we comprehend also Custom, if duly established. And the other, that we may know, that it is in the Power of the People to grant the Spoils to others, as well as other Things; and that not only after Acquisition, but also before it; so that the Capture following, the Donation and the taking Possession are united, ¹ *Brevi manu*, as the Lawyers term it. Which Grant may be made, not only by Name, but also in general; as part of the Spoil was given in the Time of the *Maccabees*, to Widows, aged People, and poor Orphans; or to uncertain Persons, as the Gifts thrown ² among the People, which the *Roman* Consuls allowed to them that could catch them.

2. Neither is the transferring this Right, either by Law, or Grant, always a mere free Gift, but sometimes the Payment of a Debt, or Satisfaction for Loss received, or by Way of Reimbursement of Charges in the War, or Recompence for Services, as when Allies or Subjects serve without Pay, or for less than their Labours deserve. For in these Cases it is usual to grant either the Whole, or some Part of the Spoil, to others.

XXIII. And our Lawyers observe, that silent Custom has so prevailed almost every where, that our Allies, or Subjects, who serve without Pay, and at their own Cost and Hazard, should enjoy what they take. ¹ The Reason, as to our Allies, is plain, because by the Law of Nature one Confederate is obliged to repair <598> the Losses of another, suffered

XXII. *That something may be changed of this common Right by any Law, or Act of the Will.*

XXIII. *Some of the Spoil may be given to our Allies.*

XXII. (1) See PUFENDORF, *Law of Nature and Nations*, B. IV. Cap. IX. § 9. Note 1.

2. *Missilia*. See PUFENDORF, where cited in the preceding Note, Note 9.

XXIII. (1) Queen *Amalasontha* makes Use of this Reason, in her Letter to the Emperor *Justinian*, which PROCOPIOUS relates, *Gothic*. Lib. I. (Cap. III.) GROTIUS.

on Account of the common or publick Affair. Besides, few will take Pains for nothing; *Therefore*, (*Seneca* ² observes) we pay *Physicians*, because we call them away from their own Affairs to serve us. *Quintilian* ³ says the same, in Regard to Advocates, because they spend their Time and Study to defend other Mens Estates, and neglect all other Means of improving their own. As *Tacitus* also remarks, *They neglect their own Affairs, to mind those of other Men*. It is therefore to be presumed, (unless some other Cause appears, as pure Kindness, or some previous Contract) that the Hope ⁴ of gaining the Enemies Spoils, as a Reward to their Pains and Hazard, made them undertake it.

XXIV. Sometimes also Subjects; illustrated by Examples.

XXIV. 1. The Thing is not so plain as to Subjects, because they owe their Service to the State; but since not all, but some only, hazard themselves; therefore it is but just, that a Retribution be made by the whole Body, to those, who more than the Rest, undergo the Fatigues and Charges of the War, but much more the Damages attending it; in Return of which, the Hopes of the whole Prey, or of an uncertain Part, is readily granted to them, and not without Reason. Thus thought the Poet.

Praeda sit haec illis quorum meruere labores.

Prop. Lib. 3. Eleg. 3. Ver. 21.

Let them enjoy the Prey, who took the Pains.

2. He speaks also of those who teach the Sciences. *Itaque his* [Medico, & bonarum artium praeceptor] &c. De Benefic. Lib. VI. Cap. XV.

3. *Neque enim video, quae justior acquirendi ratio, &c.* Instit. Orator. (Lib. XII. Cap. VII. p. 735. Edit. Obrecht.) Which *TACITUS* calls, *Omitti curas familiares, ut quis se alienis negotiis intendant.* Annal. (Lib. XI. Cap. VII.)

4. See *PLUTARCH*, in his Life of *Marcellus*. *GROTIUS*.

I find nothing in the Life of *Marcellus*, that can be applied here, except where he says, speaking of that *Roman* General, that after the Defeat of the *Gauls*, the *Roman* People were so pleased with that Victory, that they sent a fine Present to the Temple of *Delphos* for *Apollo*, and gave, moreover, a Part of the Spoils to the Cities of their Allies, as also to *Hiero*, King of *Syracuse*, the Friend and Ally of the *Romans*, p. 302. Vol. I. Edit. *Wech*.

2. As to our Allies, we have an Example in the *Roman League*, whereby the *Latins* ¹ were admitted to an equal Share ² of the Spoils taken from the Enemy in the Wars that should be made under the Conduct of the *Roman People*. So in the Wars wherein the Aetolians were assisted by the *Romans*, it was agreed, that the Towns and Lands should be the *Aetolians*, ³ but the *Romans* have the Prisoners and Moveables. After the Victory over King *Ptolemy*, ^a *Demetrius* gave Part of the Prey to the *Athe-* ^a *Plut. Demet.*
nians. St. *Ambrose*, ⁴ treating of *Abraham's Expedition*, shews the Equity of this Custom, *He thought it just, that they who assisted him in that Expedition, and were perhaps in Alliance with him, should partake of the Spoils, as a Reward of their Labour.*

3. As to Subjects, we have an Example in the *Hebrews*, among whom half the Prey was given ⁵ to them who went out to Battle, *Num.* xxxi.

XXIV. (1) Our Author does not express himself sufficiently upon the Clause of this Treaty. It took Place as well with Regard to the Wars made by the *Latins*, as those made by the *Romans*; for they mutually engaged to aid each other, in Case of being attacked, *βοηθείωσαν τε τοῖς πολεμουμένοις ἀπάση δυνάμει, λαφύρων τε καὶ λείας τῆς ἐκ τῶν πολέμων κοινὸν* [it must be read so, according to the *Vatican Manuscript*, instead of *τοῦ πολέμου κοινὸν*] τὸ ἴσον λαγχανέωσαν μέρος ἀμφοτέροι. DIONYSIUS HALICARNASSENSIS, *Lib. VI. Cap. XCV. p. 400. Edit. Oxon. (415. Sylburg.)* LIVY, who was cited in the Margin, but erroneously in all the Editions before mine, says indeed, that the *Romans* made a Treaty of Alliance with the *Latins*, *Lib. II. Cap. XXXIII. Num. 4.* but mentions no Article of that Treaty.

2. PLINY tells us that the *Roman People* gave the *Latins* a third Part of the Spoils. *Quibus [priscis Latinis] ex foedere tertias praedae Romanus populus praestabat.* Hist. Natur. *Lib. XXXIV. Cap. V.* The *Swiss Cantons*, as SIMLER informs us, divide the Booty according to the Number of Troops they severally furnish. The Pope, the Emperor, and the *Venetians* made their Division in Proportion to what each of them had contributed towards the Expences of the War; as PARUTA observes, *Lib. VIII. Pompey the Great* gave *Armenia Minor* to King *Dejotarus*, because he had aided the *Romans* in the *Mithridatick War*. GROTIUS.

Our Author took this last Fact from EUTROPIUS, for which he gives no Authority. *Armeniam minorem Dejotaro, &c. Lib. VI. Cap. XI. Num. 5. Edit. Cellar.* See also STRABO, *Geogr. Lib. XII. p. 823. A. Edit. Amst. (547. Edit. Paris.)*

3. *Et ita in foedere primo, &c. Livy, Lib. XXXIII. Cap. XIII. Num. 10.* See also POLYBIUS, *Lib. XI. Cap. V.*

4. *Sane iis qui secum fuissent, &c. Lib. I. De Abraham. Cap. III.* This Passage is cited in the *Canon Law, Caus. XXIII. Quaest. V. Can. XXV.*

5. The *Pisidians* gave Part of the Booty to those who looked after their Houses, as CHALCOCONDYLAS relates, *Lib. V. GROTIUS.*

27, 47. and 1 *Sam.* <599> xxx. 22. 2 *Macc.* viii. 28, 29. So the Soldiers of *Alexander* claimed the Spoil taken from private Men to themselves, but any that was very valuable, they presented to the King; whence we find them accused at *Arbela*,^b who conspired to rob the Publick, by appropriating the Prey to themselves, and to bring none into the Treasury.

^b *Plut. Apoph.*

4. But what publick Things belonged to the Enemies, or their King, were exempted from this Licence. Thus the *Macedonians* having forced *Darius's* Camp, near the River *Pyramus*, carried away an infinite Mass of Gold and Silver, and left nothing untouched,⁶ besides the Royal Pavilion; *It being an antient Custom among them*, (says *Curtius*) *to receive the Conqueror in the Pavilion of the conquered King*. Not unlike the Custom of the *Hebrews*, who set the Crown of the conquered King on the Head of the Conqueror, 2. *Sam.* xii. 30. assigning to him (as we find in the^c *Talmud*) all the Royal Baggage taken in War. We read of *Charles the Great*, when he had conquered the *Hungarians*, he gave the private Spoils to the Soldiers, but what belonged to the vanquished King he brought into the Treasury. The *Greeks*⁷ called the publick Spoils *Λάφυρα*, as we shewed before, the private *Σκῦλα*; their *Σκῦλα* were such as were taken in the Heat of Battle; and *Λάφυρα* when the Battle was over. A Distinction likewise allowed by other Nations.

^c *Tit. De Rege.*

5. It is plain, by what I have said already, that the *Romans*, in the early Days of their State, did not allow so much to their Soldiers, but the civil Wars indulged them with more Liberty. Thus⁸ *Equulanum* was given

6. *Namque id solum* [tabernaculum] *intactum*, &c. *Lib.* III. *Cap.* XI. *Num.* 23. See DIODORUS SICULUS, *Lib.* XVII. (*Cap.* XXXV.) And PLUTARCH, in *Vit. Alexandr.* (p. 676. A. *Edit. Wechel.*) There is something of the same Kind in XENOPHON, *Cyropaed.* *Lib.* IV. (*Cap.* VI. § 6. *Edit. Oxon.*) and *Expedit. Cyri*, *Lib.* IV. (*Cap.* IV. § 13.) GROTIUS.

7. The Grammarians understand by *Σκῦλα*, the Spoils of the Dead, and by *Λάφυρα*, the Plunder taken from the Living. See SUIDAS upon the first of these Words.

8. The Historian whom our Author cites in the Margin, says only, that *Sylla* plundered that City. APPIAN ALEXANDRINUS, *De Bell. Civil.* *Lib.* I. p. 643. *Edit. Amstel.* (380. *H. Steph.*)

to be plundered by the Soldiers, by *Sylla*. And *Caesar*, after the Battle of *Pharsalia*, gave *Pompey's* Camp to be pillaged by the Soldiers; and *Lucan* ⁹ introduces him speaking thus,

——— *Super est pro sanguine merces,*
Quam monstrare meum est; nec enim donare vocabo,
Quod sibi quisque dabit.
Let each reward himself, there lie the Spoils,
The Claim of War, and of illustrious Toils.

So the Soldiers of *Octavius* and *Anthony* ^d plundered the Camp of *Bru-* ^{d App. Civil.}
tus and *Cassius*. In another civil War the Soldiers of *Vespasian* being led against *Cremona*, tho' it was now near Night, made haste to storm the City, fearing lest otherwise the Wealth of the *Cremonese* should fall to the Share of their Commanders, and Lieutenant-Generals; for they knew well, says *Tacitus*, that ¹⁰ *The Plunder of a City taken by Storm belonged to the Soldiers, of one surrendered, to the Generals.*

6. But upon the Decay of Discipline, the Soldiers had greater Licence of Plundering granted them, upon this Account, lest, before the Danger was over, the Soldiers should leave the Enemy, and fall to plunder, ¹¹ which has often caused the Victory to be lost. When *Corbulo* had taken *Volandum*, a Castle in *Armenia*, *Tacitus* ¹² tells us, *The common People, who did not bear Arms, were publickly sold, the Rest of the Spoil fell to the Conquerors.* In the same Author, *Suetonius* ¹³ encouraged his Soldiers, in a Battle against the *Britons*, to continue the Slaughter of the Enemy, without any Regard to the Spoil, assuring them, that when <600> the

9. *Pharsal.* Lib. VII. ver. 736. & seqq.

10. *Expugnatae Urbis, &c.* Hist. Lib. III. Cap. XIX. Num. 4.

11. POLYBIUS uses this Argument, to prove the Wisdom of the *Romans*, in dividing the Spoils equally among the Soldiers, after an Expedition. *Hist.* Lib. X. Cap. XVI. XVII.

12. *Et imbellis vulgus, &c.* *Annal.* Lib. XIII. Cap. XXXIX. Num. 7.

13. *Conferti tantum & pilis emissis, &c.* *Idem.* *Annal.* Lib. XIV. Cap. XXXVI. Num. 4.

Victory was fully gained, they should enjoy the whole. Such like Examples we frequently meet with, besides what we have above quoted ¹⁴ out of *Procopius*.

7. There are some Things of so small a Value, that they do not deserve to be reserved for the Publick, these generally belong to the Captors, by the Consent of the People: Such, in the old *Roman* State, were a Spear, a Javelin, Wood Fodder, Casks, Leather Bags, Torches, and any Thing else below the Value of two Pence Halfpeny. For, as *Gellius* ¹⁵ informs us, these Things were expressly excepted in the military Oath. Like to this is the Allowance to Seamen that serve even for Pay. The *French* call it *Dépouille*, or Pillage, and under it they include Apparel, Gold and Silver, within ten Crowns. In other Places, a certain Part is given to the Soldiers, as in *Spain*, one While ¹⁶ the fifth, another Time the third, and sometimes half the Booty, falls to the King; and the seventh, sometimes the tenth, to the General; the Rest belongs to the Captors, ¹⁷ except Ships of War, which are all the King's.

8. Sometimes the Spoil is bestowed with Regard to the Labour, Hazard, and Charge; as in *Italy*, the third Part of a Ship taken belongs to the

14. See the Passage of PROCOPIUS quoted above, (§ II. *Num.* I.) That Historian farther observes, that the Soldiers of the same *Salomon*, in an Expedition against the *Levatae*, (a Kind of *Moors*) murmured upon his keeping the Booty from them; but that he represented to them, he only did so in order to distribute it according to each Man's Merit, when the War was concluded. *Vandalic.* Lib. II. (Cap. XXI.) All the Spoils taken at *Picenum* were brought to *Belisarius*, who divided it in that Manner; giving for his Reason, that it was not just that whilst some were at great Pains to kill the Drones, others, who had no Share in the Labour, should eat the Honey. *Gotthic.* Lib. II. (Cap. VII.) GROTIUS.

15. See the Passage above, § 2I. *Note* 6.

16. The *Turks* have the same Custom, according to LEUNCLAVIUS, *Lib.* III. and *Lib.* V. GROTIUS.

17. Amongst the *Goths*, the Engines of War were excepted, as JOHANNES MAGNUS informs us, *Hist. Sued.* Lib. XI. Cap. XI. GROTIUS.

I must say the same Thing of this Quotation as I have done of that above, upon § 14. *Note* 8. There is nothing of that Kind, either in the Place referred to, or in any other of JOHANNES MAGNUS's. Our Author having probably added at the same Time, these two Particularities, from the Customs of the antient *Goths*, to his Example, which he had taken from the same Place, has confounded in both the Paragraphs, to which he refers them, the Name of one Historian with that of another.

Proprietor of the victorious Ship, a third to those who had Merchandizes in the Ship, and the other to those that sought against the Enemy. Sometimes it happens, that they who at their own Charge and Danger go upon military Enterprises, do not carry away all the Prize, but some Part is owing to the State, or to him who derives his Right from the State. So in *Spain*, if any Ship be fitted out upon a private Charge, part of the Prize comes to the King, and part to the Admiral. So likewise by the Custom of *France* and *Holland*, the tenth Part belongs to the Admiral, the fifth Part of the Prize being first laid aside for the State. But now it is customary at Land, in the taking of Towns, and in Battles, that every one keep what he takes; but in Excursions, whatsoever is taken, is divided among them that take it, according to the Merit and Dignity of each Person.

XXV. What has been said may serve to let us understand, that if in any Nation, not engaged in War, a Dispute arise concerning any Thing taken in War, the Things shall be adjudged to him, whom the Laws or Customs of the People on whose Side he is, and by whose Authority the Things were taken, shall favour. But if nothing can thereby be proved, then by the common Right of Nations, the Thing taken shall be adjudged to the People; if at least it were taken in the Act of War. For it is plain from what we have already said, that what *Quintilian* alleges for the *Thebans*,¹ does not always prove true, that the Right of War has no Power on that which is reducible to a Trial of Law, and that what is got by Arms can only be kept by Arms.

XXV. *What Use may be made of what has been here said.*

XXVI. 1. But whatsoever Things do not belong to the Enemy, tho' found among the Enemies, shall not be the Captor's. For this (as I said^a before) is neither agreeable to the Law of Nature, nor was introduced by the Law of Nations. So the *Romans*, in *Livy*, tell *Prusius*,¹ *If that Land had not been Antiochus's, it could not by Conquest belong to the Romans themselves.* But if the Enemy had any Right annexed to the

XXVI. *Whether Things taken out of the Dominions of either Party be lawful Prize.*

^a Ch. 4. § 7.

XXV. (1) *Dicamus in primis*, &c. *Instit. Orat.* Lib. V. Cap. X. p. 432. *Edit. Burman.*

XXVI. (1) *Si autem Antiochi*, &c. *Livy*, Lib. XLV. (*Cap. XLIV. Num. 15.*) So after the Defeat of *Jugurtha*, King *Bocchus*, his Son in Law, did not obtain the Lands he

Possession of the Things, as of Pledge, or ² Retention, or Servitude, that is no Hindrance that it should not be the Captors.

2. This is also disputed, whether Things or Persons taken without the Territories of either Party engaged in the War, belong to the Captors. If we only respect the Right of Nations, I think the Place here can be no Security, as we have said, we may lawfully kill an Enemy any where. But the Sovereign of that Place may, by his Laws, prohibit it; and, if they will not obey him, may demand Satisfaction, as for an Insult on his Authority: Just as, according to the *Roman* Lawyers, ³ the Proprietor of a Ground may hinder any one from coming to hunt there, tho', when one does so, the Beasts taken belong to the Hunter.

XXVII. *How proper is this Right to a solemn War.*

XXVII. But this external Right of acquiring Things taken in War, is by the Law of Nations so peculiar to a ¹ solemn War, that it has no Force in other Wars. For in other Wars between Foreigners, a Thing is not acquired by Vertue of the War, but in Satisfaction of some Debt, which otherwise could not be recovered. But in civil Wars, whether they be great or small, there is no Change of Property but by the ² Sentence of a Judge. <602>

pretended to, because they were not *Jugurtha's*, but belonged to the Children of *Masinissa*, as we find in APPIANUS ALEXANDRINUS, *Excerpt. Legat.* XXVIII. There is something of a like Nature in ALBERTUS CRANTZIUS, *Saxonic.* Lib. XII. (Cap. VII.) GROTIUS.

Our Author said here by Mistake, *The Children of Bocchus*, instead of the Children of *Masinissa*.

2. See PUFENDORF, *Law of Nature and Nations*, B. V. Chap. XI. § 6. Note 3. (*Retention*).

3. *Plane qui alienum fundum, &c.* Digest. Lib. XLI. Tit. I. *De acquir. rerum Domin.* Leg. III. See also Lib. VIII. Tit. III. *De Servit. praedior. rustice.* Leg. XVI.

XXVII. (1) But see what I have said upon Chap. IV. § 4. Note 1.

2. In most civil Wars no common Judge is admitted. If the State be monarchical, the Dispute turns either upon the Succession to the Kingdom, or upon a considerable Party of the State's, pretending, that the King has abused his Power, in a Manner that authorizes the Subject to take up Arms against him. In the first Case, the Nature itself of the Cause for which the War is undertaken, occasions the two Parties of the State to form, as it were, two distinct Bodies, till they come to agree upon an Head by some Treaty, made either by Consent, or in Consequence of the Superiority of one of the Parties. Upon this Treaty depends the Right Persons may have, or not

have, to what has been taken on any Side; and nothing hinders that Right from being admitted to take Place in the same Manner, as in publick Wars between two States always distinct. Other Nations which have not been involved in the War, have no Authority here to examine into the Validity of the Acquisitions; and the two Parties, by reuniting, may as well discharge themselves from the Damages they have mutually occasioned each other. The other Case, I mean the Rising of a considerable Part of the State against the Prince upon the Throne, can hardly happen, unless when that Prince has given Room for it, either by Tyranny, or the Violation of the fundamental Laws of the Nation. Thus then the Government is dissolved, and the State also divided into two distinct and independent Bodies; so that we are to form the same Judgment here, as in the first Case. And much more does that take Place in the civil Wars of a republican State; in which the War immediately, of itself, dissolves the Sovereignty, that subsists solely in the Union of its Members. And if the *Roman* Laws decreed that the Prisoners taken in a civil War could not be made Slaves, that was, as the Civilian *ULPIAN* says, according to the celebrated *Mr. NOODT's* Explanation, (in his *Comment. in Digest*, Lib. I. Tit. V. p. 30, 31.) because a civil War was considered, not properly as a War, but as a civil Dissention. For, adds he, a real War is made between those who are Enemies, and animated with the Spirit of Enemies, which prompts them to endeavour the Ruin of each other's State. Whereas, in a civil War, however pernicious it often proves to a State, both Parties are supposed to intend the Preservation of the State; the one is only for saving it in one Manner, and the other in another: So that they are not Enemies, and every Person of the two Parties continues always a Citizen of the State, so divided. These are the antient Lawyer's Words, *In civilibus dissentionibus, quamvis saepe per eas Respublica laedatur, non tamen in exitium Reipublicae contenditur; qui in alterutras partes discedent, vice hostium non sunt eorum, inter quos jura captivitatum, aut postliminiorum fuerunt, &c.* *Digest. Lib. XLIX. Tit. XV. De Captivis & Postlimin. Leg. XXI. § 1.* *Mr. NOODT* adds to this two Passages from *CICERO, Orat. pro Ligari. Cap. VI. & in Catilin. Orat. III. Cap. X.* But that is a Supposition or Fiction of Right, which does not hinder all I have been saying from being true, and from taking Place in general. The State, of which the Preservation is intended, is not, in the Cases I have spoke of, a Body of Citizens, united under the same Government; it is an Assemblage of People, who having been in Subjection to the same Government, within a certain Extent of Country, are willing indeed to continue for the future in a common Dependence, but do not agree amongst themselves upon the Person, or Body of Men, in whose Hands the supreme Authority ought to be lodged. And as, after their Reunion, the Sovereign acknowledged by all, commonly suffers the antient Laws to subsist, either by an express or tacit Consent, which always takes Place, when there appears no express Will by which he abrogates those Laws, either in Whole or in Part: Hence it was that amongst the antient *Romans*, one could not appropriate to one's self the Prisoners taken in a civil War, as real Slaves; and not upon Account of any Defect of Conditions or Formalities required, according to our Author, by the Law of Nations, in a publick or solemn War.

Of the Right over Prisoners.

I. *All Prisoners in a solemn War are, by the Law of Nations, Slaves.*

^a B. ii. ch. 22. § II.

^b B. ii. ch. 5 § 27.

I. I. There is no Man by Nature Slave to another, that is, in his primitive State considered, independently of any human Fact, as I have ^a said in another Place; in which Sense we may take the Lawyers, when they say that Slavery is ¹ against Nature, but it is not repugnant to natural Justice, that Men should become Slaves by a human Fact, that is, by Vertue of some Agreement, or in Consequence of some Crime, ^b as we have also said already.

2. But by the Law of Nations, which I am now treating of, Slavery is of a more large Extent, both as to Persons and Effects. For if we consider the Persons, not only they who surrender themselves, or submit by Promise to Slavery, are reputed Slaves; but all Persons ² whatsoever taken

I. (1) *Servitus est constitutio Juris Gentium, qua quis dominio alieno contra naturam subjicitur.* Digest. Lib. I. Tit. IV. *De statu hominum*, Leg. IV. § 1.

2. That is to say, where it is customary to make Slaves of all such as are taken in War; for our Author says below, that this is not now practised amongst Christians, and that even formerly it was not a received Custom with all Nations. But in this Case, as in other Things, which our Author refers to his arbitrary Law of Nations, the Power of a Master over his Slaves, made such in this Manner, is not derived solely from Custom. If a Prisoner of War found the Condition of a Slave too hard, it was in his own Power to avoid it, by declaring that he would not acknowledge him for his Master, who had taken him. He did not thereby commit any Offence, nor violate any Law to which he was obliged to submit; he only exposed himself to the Effects of the Enemy's Resentment, and to the Loss of Life, from the Fear of losing his Liberty. But if the Prisoner made no Declaration of his Will, contrary to the received Custom of States at War, he was, and might be deemed tacitly to submit to it, after the Victor had declared on his Side, his being contented to give him his Life, upon Condition, that he would acknowledge him for his Master, which he did by not

in a solemn War, as soon as they shall be brought into a Place whereof the Enemy is Master; as *Pomponius*³ tells us. Neither is there any previous Crime required, for here every one's Condition is alike, even of those who have unhappily been found among the Enemies, upon the sudden breaking out of the War,⁴ as I have said already. *Polybius*, of the Perfidy of the *Mantineans*, speaks thus,⁵ *What must these Men suffer, to make their Punishment just? If any one say, they should be sold, with their Wives and Children, as Prisoners of War; but so may they be, by the Law of Arms, who are most innocent.* And hence it is, as *Philo*⁶ observes, *Many good Men lose their natural Liberty by divers Accidents.*

3. *Dion Prusaensis*, recounting the several Ways of acquiring Property, says,⁷ *The third is, when a Man has taken a Prisoner in War, by that Means he makes him his Slave.* So *Oppian* calls the carrying away of Chil-

keeping the Prisoner in Bonds, or narrowly watched; for neither was he in Rigour obliged, by Vertue of the Custom, to give the Prisoner Life, even tho' the latter was willing at that Price to become his Slave: It was only necessary for him to make known sufficiently his not being willing to accept the Prisoner's Offers. So that the Force of the received Custom was only founded upon the mutual Consent, express or tacit, of the Victor and Prisoner, from whence resulted an Engagement, which was presumed, and might easily be presumed, from the good Reasons for which this Custom was introduced, and of which our Author will speak below.

3. See the Law cited in the preceding Chapter, § 3. Note 3.

4. See also the preceding Chapter, § 12. Num. 1.

5. *Histor. Lib. II.* (Cap. LVIII. p. 200. *Edit. Amstel.*) The Grammatician *SERVIVS* says, that *Hesione*, the Daughter of *Laomedon*, King of *Troy*, was made a Captive by Right of War, *A cujus portu [Trojae] quum, &c. In Aeneid. Lib. I.* (ver. 619.) He observes elsewhere, in relating the same Fact, that the Greeks refused to restore *Hesione* to the *Trojans*, because she was theirs by the Right of War. *Hesionem Graeci Trojanis reddere noluerunt, dicentes, se eam habere Jure Bellorum.* In *Lib. X.* *JOSEPHUS* speaks of some *Jews*, whom *Cassius* had taken Prisoners, but not according to the Laws of War; for which Reason, upon *Hyrchanus*'s demanding them in the Name of the Nation, *Mark Anthony* ordered them to be restored. *Antiq. Jud. Lib. XIV.* (Cap. XXII. p. 492. A.) He mentions the Law relating to Prisoners of War in another Place, *Τῶ τῶν δοριαλότων νόμῳ*, which *MENANDER the Protector* expresses thus, *Δορυληπτῶν θεσμῶ.* Many Things upon this Subject are said in the preceding Chapter; for Authors join together, or put in the same Class, Prisoners of War, and Things taken from Enemies. *GROTIUS.*

6. *Lib. omnem virum bonum esse liberum* p. 866. *Edit. Paris.*

7. *Orat. XV.*

dren taken in War, *Πολέμου νόμον, the Law of Arms. Halieut. Lib. 2.*
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II. *And their Posterity.* II. Neither do only they themselves become Slaves, but their Posterity for ever; for whosoever is born of a Woman after she is a Slave, is born a Slave: And this is what ¹ *Martian* said, that by the Law of Nations those that were born of Bond-Women are accounted Slaves. And *Tacitus*, ² speaking of the Wife of a *German* Prince (taken Prisoner) said, she had *Servitio subjectum uterum, a Womb subjected to Bondage*, that is, her Child would be a Bondslave.

III. *Any Thing done to them is unpunishable.* III. 1. But the Effects of this Right are infinite, so that there is nothing that the Lord may not do to his Slave, as *Seneca* ¹ the Father said, no Torment but what may be inflicted on him with Impunity, ² nothing commanded him but what may be exacted with the utmost Rigour and Severity; so that all manner of Cruelty may be exercised by the Lords

II. (1) *Jure Gentium servi nostri sunt qui ab hostibus capiuntur, aut qui ex ancillis nostris nascuntur.* Digest, *Lib. I. Tit. V. De Statu Hominum, Leg. V. § 1.* See above B. II. *Chap. V. § 29.*

2. He speaks of the Wife of *Arminius*, who was taken by the *Romans*, being with Child: *Arminium, super insitam violentiam, &c.* *Annal. Lib. I. Cap. LIX. Num. 2.*

III. (1) Our Author cites here in the Margin of his first Edition, X. *Controv. V.* The others have I. *Controv. V.* but there is nothing of this Kind in either of those Places. The Passage is in *Lib. V. Controv. XXXIV.* wherein the Rhetorician calls this absolute Power of Masters over their Slaves, a Right known to all the World: *Qui [Pictor] haec tantum, &c.* p. 391. Edit. Gron. Var. The fifth *Declamation* of the tenth Book of *Excerpta Controv.* treating this same Subject occasioned this Mistake: For the latter is extracted, *Ex Controv. V. Lib. X.* This we observe by the by as an Example of the Origin of these Mistakes, into which our Author pretty often falls. I find also a Passage very like this in *SENECA* the Philosopher: *Quum in servum omnia liceant, est aliquid, quod in hominem licere commune jus animantium vetet.* De *Clement. Lib. I. Cap. XVIII.*

2. This Restriction is to be well observed; for if the Master treats the Slave, acquired by the Right of War, with excessive Cruelty, whatever Impunity he may promise himself, either from the civil Laws of his Country, or from neutral People; the Prisoner, who only submitted to Slavery upon the tacit Condition, that the Victor should behave to him in such a manner as not to make him think his Fate more insupportable than Death itself, is then discharged from his Engagements, and re-enters into a State of War with his Master, who has violated his.

upon their Slaves; unless this Licence is somewhat restrained by the civil Law. *It is allowed by all Nations to the Lord, to have Power of Life and Death over his Slave*, we are told by *Caius*,³ (the Lawyer.) He also adds, that this large Power had been limited by the *Roman Laws*, that is, in Countries which are under the Dominion of the *Romans*. Hither we may refer that of *Donatus* upon *Terent*. *What may not a Lord lawfully do to his Slave?*

2. Not only the Person, but all Things taken with him, become lawful Prize. A Slave that is in the Power of another,⁴ *Justinian* says, can call nothing his own.

IV. Hence the Opinion may be confuted, or at least restrained, which maintains that Things incorporeal¹ cannot be acquired by the Law of Arms. It is true, that primarily, and directly, they cannot, but they may be acquired by means of the Person whose they had been. But we must except those Rights that are founded on a particular Relation of Persons, which renders them unalienable, such as paternal Power. For if these Rights are capable of remaining, they remain with the Person,² if not, they are extinct.

IV. *The incorporeal Goods of the Slave become the Lord's.*

3. *Igitur in potestate sunt servi, &c.* Digest, *Lib. I. Tit. VI. De his qui sui vel alieni Juris sunt*, Leg. I. § 1. See also the *Institutes*, at the same Title, I. 8. The Grammarian *DONATUS* says, [JUSTA & CLEMENS] *Ita dixit justa, ut alibi*. Non necesse habeo omnia pro meo jure agere. *Quod enim non justum domino in servum?* In *Andr. Terent. Act I. Scen. I. (Ver. 9.)*

4. *Ipse enim servus, qui, &c.* Institut. *Lib. II. Tit. IX. § 3.* *VALERIUS MAXIMUS*, speaking of a Consul, who had been taken by the *Carthaginians*, says, that he had lost every Thing by Right of War; but he recovered all and was even made a Consul again: *Quo* [Cn. Cornelius Scipio Asina] *Consul, &c.* *Lib. VI. Cap. IX. Num. II.* *PHILO JUDAËUS* says that a Slave can call nothing his own, not even his Person. *Lib. Omnem virum bonum esse liberum, (p. 871. C.) GROTIUS.*

IV. (1) See what *PUFENDORF* says upon this Question, *B. VIII. Chap. VI. § II. Law of Nature and Nations.*

2. Thus according to the *Romans Laws*, a Father who had been made Prisoner, if he returned into his Country, still retained the Rights of his paternal Power: But if he died in Captivity, his Children were deemed free from the Moment he had been taken, so that those Rights were then immediately extinct. *Si ab hostibus captus fuit parens, &c.* Institut. *Lib. I. Tit. III. Quibus modis jus patriae potestatis solvitur, § 5.* So, those who had surrendered themselves to the Enemy, not having any Claim to

V. *The Reason
why this was
ordained.*

V. 1. Now this large Power is granted by the Law of Nations for no other Reason, than that the Captors being tempted by so many Advantages might be inclined to forbear that Rigour allowed them by the Law, of killing their Prisoners, either in the Fight, or some Time after.

^a Chap. iv.

As ^a I said before: ¹ *The Name of Slaves, Servi, (Pomponius tells us) arose from this, that Generals sold their Prisoners, thereby preserving them from Death.* I said that they might be inclined to forbear; for there is no Sort of Agreement to engage them to it, if we only respect this Law of Nations, but a Motive drawn from Interest.

2. And for the same Reason he has Power to transfer this Right to another, in the same manner as the Property of Goods. This Power also reaches to the Children born in Captivity, because if the Captor had been pleased to have used his utmost Power, he might have prevented their being born; and consequently those born before the Captivity of the Mother, (if they are not personally taken) do not become Slaves. And the Reason that by the Law of Nations Children followed the Mother's Condition, without regard to that of their Father, is because the Cohabitation of Slaves was neither regulated by the Laws, nor maintained in such a manner, that the Mother should be always under the Eye and Guard of the Father, so that it would have been a very difficult Thing to prove who was the Father. And thus we must understand that of *Ulpian*, ² *The Law of Nature is this, that he that is born without lawful*

the Right of *Postliminy*; if a Father had fallen in this manner into the Hands of the Enemy, his Children from thenceforth were no longer in his Power, whether he did or did not return into his Country: *Postliminio carent, qui armis victi hostibus se dederunt.* Digest, *Lib. XLIX. Tit. XV. De Captivis, &c. Leg. XVII.* See below, *Chap. IX. § 8.*

V. (1) *SERVORUM adpellatio, &c.* Digest, *Lib. L. Tit. XVI. De verborum significatione, Leg. CCXXXIX. § 1.* See also the Grammarian *SERVIVS*, where he gives the Etymology of the Word *Saltem*, in *Aeneid. Lib. IV. (Ver. 327.) GROTIUS.*

2. *Lex naturae haec est, ut qui nascitur, sine legitimo matrimonio, matrem sequatur, nisi lex specialis aliud inducit.* Digest, *Lib. I. Tit. V. De Statu hominum, Leg. XXIV.* But there is just Reason to believe, that the Civilian understands here, by *the Law of Nature*, natural Right properly so called, and this is alluded to by a Passage of *CICERO*'s which *Mr. SCHULTING* cites in his Notes upon the Fragments of *ULPIAN, Tit. V. § 8. Ut enim, Jure Civili, qui matre est libera, liber est: Item, Jure Naturae, qui Dea matre est, Deus sit necesse est.* "As according to Civil Right, an Infant born of a free

Marriage should follow the Mother's Quality, that is, general Custom founded on some natural Reason; for so the Expression *Natural Right* is sometimes taken in an improper Sense, as we have shewed^b in another Place.

^b *B. 2. ch. 13. § 26.*

3. But that this Custom of Nations was not admitted without Reason, we may gather from the Practice of civil Wars, wherein Prisoners are generally put to the Sword, because they cannot be made Slaves, which³ *Plutarch* well observed in the Life of *Otho*, and⁴ *Tacitus* in the second Book of his History.

4. But whether Prisoners should belong to the People, or to the private Persons who took them, must be determined from what we have said already of the Spoil; for the Law of Nations has in this Case put Men in the same Rank with Goods. So⁵ *Cajus* the Lawyer, *Those Things which*

Woman is also free. In like manner by the Law of Nature, he who has a Goddess for his Mother, must necessarily be a GOD." *De Natur. Deor.* Lib. III. Cap. XVIII. For the antient Lawyers pretended, that according to the Law of Nature, founded upon Reason, Children, born out of Wedlock, follow the Condition of their Mother, on account of the Uncertainty in Relation to the Father. And this indeed takes Place, by the very Principles of that Law, in regard to Children born of a Mother, who abandons herself to all Comers: But as to those, whose Father is sufficiently known, as the Father of the Children of a Woman Slave may be, the Law of Nature of itself is far from allowing that their Condition shall always be the same with that of the Mother. See above, *B. II. Chap. V. § 29. Num. 1.* There is in Reality no greater Certainty, in regard to the Birth of Children, whose Mother is lawfully married: It is only a Presumption, authorized by the Laws, which leave it without Force, the Moment it is destroyed by sufficient Reasons. So that, according to the *Roman* Law, an Husband *is not* bound to acknowledge a Child for his own, because born of his Wife and in his House, in the Sight and Knowledge of all his Neighbours, if it appears by good Proof, that he has not lain with his Wife for some Time, upon account of a Distemper, or some other Impediment, or if he was impotent: *Sed mihi videtur, quod* & SCAEVOLA probat, &c. *Digest, Lib. I. Tit. VI. De his qui sui vel alieni juris sunt, Leg. VI.*

3. *P. 1073. Vol. I. Edit. Wech.*

4. *Obstructae strage corporum viae, &c.* (Cap. XLIV. *Num. 1.*) The same Historian Remarks elsewhere in speaking of the People of *Cremona*, that it signified nothing to the Soldiers to make them Prisoners, for all *Italy* were agreed not to buy such Slaves: *Inritamque praedam fecerat consensus* Italiae, *emtionem talium mancipiorum aspernantis*, Lib. III. (Cap. XXXIV. *Num. 3.*) GROTIUS.

5. *Item quae ex hostibus capiuntur, &c.* *Digest, Lib. XLI. Tit. I. De acquirendo rerum dominio, Leg. V. and VII. Princ.*

are taken from the Enemy, by the Law of Nations are instantly the Captors, so also free Men are made Slaves.

VI. *Whether Prisoners may make their Escape.*

VI. 1. I cannot agree with those Divines, who maintain that Prisoners taken in an unjust War, or their Children, may not lawfully make their Escape, unless it be to their own Country. Here is the Difference, ¹ *If they can escape to their own <605> Country during War, they recover their Liberty by the Right of Postliminy:* But if elsewhere, or to their own Country after the making of the Peace, they are to be delivered to their Masters upon demand. But it does not therefore follow, ² that the Prisoners are bound in Conscience not to run away, for there are many Rights that have only an external Effect, and impose no internal Obligation, such are those of War, of which we are now treating. Neither can one object, that from the very Nature of Property a real Obligation is laid upon the

VI. (1) See below, *Chap. IX. § 5.* PLINY says, that *Marcus Servius* was taken twice by *Hannibal*, and escaped as often out of Prison: *Bis ab Annibale captus—bis vinculorum ejus profugus, &c.* *Hist. Natur. Lib. VII. Cap. XXVIII.* GROTIUS.

2. But there is an express or tacit Consent of the Prisoner in this Case, by Virtue of which, the Victor has acquired a Right over him, that lays the Slave under a real Obligation, and consequently will not permit him in Conscience to run away, or to withdraw himself in any other manner from the Subjection, into which he is entered. See above, § 1. of this Chapter, *Note 2. § 3. Note 2.* and PUFENDORF'S *Law of Nature and Nations*, B. VI. Chap. III. § 6. as also Mr. NOODT'S *Discourse Of the Power of Sovereigns*, p. 247. & seqq. the second of the *French Translation*. The Justice or Injustice of the War has nothing to do in this Case. How unjustly soever an Enemy has taken up Arms, the Conventions made with him whilst an Enemy were not the less valid, by the Confession of our Author who lays that down as a Principle below. Besides both Parties generally believe their own Cause just: And if the Victors apprehended, that the Prisoners under Pretext of the Injustice of the War, should believe they had a Right to throw off the Yoke, as soon as they had a favourable Occasion; they would give none of them their Lives. The Interest therefore of Mankind, and even the good of the Conquered, required, that the Engagement of Prisoners, whether express or tacit, should be valid, and that they should renounce the Right of using Reasons deduced from the Injustice of the War, or the Necessity to which they had been reduced, in order to save their Lives. From whence appears the Difference between this Case, and that objected, of a Person who falling into the Hands of Robbers and Pirates should engage to become their Slave. See a Dissertation of the late Mr. HERTIUS, *De Lytro*, in *Vol. I. of his Comment. and Opuscul, &c.* Sect. II. § 24. p. 277, 278. The Reader may consult also the Commentary of Mr. VAN DER MEULEN, who also refutes our Author.

Conscience: Because there being many Kinds of Property it may be such an one as has only Power in ³ human Judgment and by Compulsion, which is often found in other Kinds of Right.

2. For such in some Sort is also that Right that makes void some Wills, or Testaments, for want of some particular Forms which the civil Law requires. For the more probable Opinion is, that what is bestowed by such a Will, may be retained with ⁴ a safe Conscience, at least, whilst there is no Opposition made to it. And the Right of Prescription, which a dishonest Possessor acquires by the civil Law, very much resembles that we now treat of. For the Courts of Justice maintain such a Possessor, ⁵ as if he were real Proprietor; just as the Law of Nations maintains the Possessors of Prisoners that are taken even in an unjust War. And by this Distinction is solved that difficult Point of *Aristotle's*, ⁶ *Ἄρα δίκαιον τὰ αὐτοῦ ἔχειν ἑκαστον, &c.* *Is it not just that every one should enjoy his own? But whatsoever the Judge has decreed to the best of his Knowledge, (however unjust his Sentence be) stands good in Law, so that the same Thing may be both just and unjust.*

3. But to return to our Question, there can be no Reason supposed, why Nations should have extended the Force of this Right so far as to oblige the Conscience. For the Power of claiming a Prisoner, of forcing him to return, nay, of binding him too, and of taking what he has, is a Motive strong enough to induce the captor to save Life of his Captive; or if he were so barbarous as not to be moved by this Consideration, then certainly he would not be prevailed upon by any Bond of Conscience, but if he think that absolutely necessary, ^a he may demand an express Promise, ⁷ or a formal Oath.

^a See Bembo, *Hist.* l. 10.

3. *Dominium, quod tantum in judicio humano, & quidem coactivo, valeat*, says our Author.

4. See PUFENDORF's *Law of Nature and Nations*, B. IV. Chap. X. § 7.

5. That is to say, in the Prescription of thirty or forty Years: For Faith and just Dealing was required in the *Usucaption*, or ordinary Prescription. See PUFENDORF, *Law of Nature and Nations*, B. IV. Chap. XII. § 1.

6. *De Sophist. Elench.* Lib. II. Cap. V. (XXV.) p. 308. D. Vol. I. *Edit. Paris.*

7. Our Author then confesses, that an express Promise would be valid in this Case. Now such Promises were often made. And wherefore should not a tacit Engagement have as much Force?

4. Besides we must not rashly admit that Interpretation, which makes an Act criminal, which is otherwise allowable, in a Law not arising from natural Equity, but made purposely to avoid a greater Mischief. ⁸ *It signifies not much* (says *Florentinus* the Lawyer) *how a Prisoner escapes, whether freely dismissed, or by Force or <606> Cunning has got out of the Power of his Enemy.* ⁹ Because this Right of Captivity is so a Right, that in another Sense it is for the most part even an Injustice; as ¹⁰ *Paulus* the Lawyer expressly calls it; a Right as to some Effects, but an Injustice in respect to the Nature of the Thing itself. Whence it is also plain, if any Man taken in an unjust War fall into the Power of his Enemy, he cannot in his Conscience be thought guilty of Theft, if he carries off with him

8. *Nihil interest, quomodo captivus, &c.* Digest, *Lib. XLIX. Tit. XV. De Captivis & Postlimin, &c. Leg. XXVI.*

9. This does not prove, that the Obligation of Prisoners of War was considered as of no Force: Otherwise they ought to have been received also, and to have had the Right of *Postliminy* granted them, after the making of Peace. But this was, because during the course of the War, the Prisoners were not deemed to be fully engaged as Slaves. It was not known to what Fate the Conqueror would doom them. There was always Hopes of recovering them, and it gave no great Trouble, if they had contracted in that respect any particular Engagement, which the State was not obliged to make good. In making Peace then, the State renounced the Right of receiving Prisoners, and of reinstating them in all the Rights of their former Liberty, if it was not stipulated by the Treaty.

10. *Idque naturali aequitate introductum est, ut qui PER INJURIAM ab extraneis detinebatur, is, ubi in fines suos rediisset, pristinum jus suum reciperet,* Digest, *Lib. XLV. Tit. XV. De Captivis & Postlimin. &c. Leg. XIX. Princ.* I do not know, whether this Lawyer intended to tax with *Injustice*, in the Sense and Meaning of our Author, the Detention of a Prisoner of War, much less his Subjection to Slavery. Upon that Foot all the Wars of the *Romans* were just on their Side, as the Right of *Postliminy*, of which we now speak, took Place in them all. It is likely, that *PAULUS* means only, that the Prisoner was in no Fault, and the Word *injuria*, signifies in this Place no more than an Act of Hostility, just or not, on the Side of those, who exercise it. It is in this Sense, that another Civilian, speaking of violent Means, used by private Persons, says, that, if without having assembled People, or beaten any one, they have taken away *per injuriam*, that is to say, by main Force, any Thing belonging to another; they render themselves thereby liable to the Penalty of the *Julian Law. De Vi privatâ: Sed si nulli convocati, nullique pulsati sint; PER INJURIAM tamen ex bonis alienis quid ablatum sit: Hac lege teneri eum, qui id fecerit.* Digest, *Lib. XLVIII. Tit. VII. Ad Leg. Jul. de Vi privat. Leg. III. § 2. Per injuriam* signifies the same in this Passage, as *Vim facere* in the beginning of the Law.

¹¹ what was his own; or tho' not his own, ¹² if it were due to him as a Reward for his Labour, over and above his Sustenance; provided that he himself owes nothing to his Master, upon his own, or the publick Account, or to him from whom the Master derives his Right. Neither does it avail to say, that such a flight, and carrying off Goods, when caught, use to be severely punished: For there are many other Things that those

11. This being a Consequence of our Author's Principle, which we have refuted in *Note 2.* upon this Paragraph, it follows that we must decide in a manner directly contrary to it.

12. To this may be referred the Passages of St. IRENAEUS and TERTULLIAN, which we have quoted before, *B. II. Chap. VII. § 2. Note 3.* There is a Passage in PHILO JUDAEUS, where the same Subject is handled, that is, what the *Israelites* did on their Departure out of *Egypt.* "As the *Egyptians*, (says he) subdued at Length by so many Plagues from Heaven, pressed the *Israelites* to depart, and expelled them in some Measure; the latter calling to mind the Dignity of their Origin, undertook a Thing worthy of free Men, who had not forgot the unjust and cruel Treatment they had been made to suffer. For they carried off a great Booty, with one Part of which they loaded themselves, and with the other their Beasts of burden. Not that they were greedy of Riches, or coveted the Goods of others, as Slanderers might accuse them; for from whence could they have such Sentiments? But their Motive was, first to obtain by that Means the Reward due to them for their long Service, and next to avenge themselves, tho' not so much as the *Egyptians* deserved, for the Slavery they had imposed upon them. For there is no Comparison between Loss of Money and Loss of Liberty; for the Preservation of which, wise Men sacrifice both their Lives and Estates." So that whether the *Israelites* are considered in a State of Peace or War with the *Egyptians*, it is most easy to justify their Conduct. For, in the first Case, they did no more than seize the Wages, that had been so long kept from them, and in the other, they plundered their Enemies by the Right of Victors, as they had supplied them with a just Cause for taking up Arms, by treating them like Prisoners of War, when they were Strangers, and Suppliants. *De Vita Mosis*, (p. 624. *Edit. Paris.*) In St. JEROME's Letters there is a like Account concerning an holy Person named *Malchus*. See also that of *Leupges* the *Lombard* as related by his great Grandson, PAUL WARNAFREDE, *Lib. IV.* and the Confession published under the Name of *Lanicus Patricius*. GROTIUS.

The Case of the *Israelites* is very different from that in Question; and the Passage of PHILO, which I have cited more at large than our Author has done, relates as little to it; as any one will easily conclude upon Reflection. The same must be said of the Story of *Malchus*: For he had been taken by *Arabian* Robbers, and escaped from their Slavery, carrying away with him two of his Master's Goats. See St. JEROM, *De vita Malchi*, Vol. I. p. 256. & *seqq.* Edit. Froben.

who have the Power in their Hands do for their own Advantage, and not because they are just.

5. But whereas some Canons¹³ prohibit the persuading a Slave to quit his Master's Service; if that Prohibition relate to those Slaves who are justly punished with Bondage, or have by a voluntary Contract made themselves so, it is then just; but if to them, who are taken in an unjust War, or born of such, it shews only that Christians should advise Christians to Patience, rather than to those Acts, which tho' strictly lawful, may give Offence either to Infidels or weak Minds. In like manner we are to understand the Advice of the Apostle's given to Slaves, unless that Advice may seem rather to require of Slaves a faithful Obedience to their Masters, whilst they are with them, which is agreeable to natural Equity, for their Labour and their Maintenance mutually answer one another.

VII. *Whether they may resist their Lords.*

VII. But as the same Divines hold, that a¹ Slave cannot resist his Lord in executing that external Right which he has over him without Injustice, I entirely agree with them; but there is this manifest Difference between that external Right, and those Things I said before. That external Right, which consists not in a bare Impunity, but is moreover supported by the Authority of Courts of Justice, would be wholly vain, if on the other Side it were lawful to resist. For if it be allowable for a Slave to resist his Lord, he may² as well resist the Magistrate that defends his Lord: Since

13. That of the Council of *Gangra: Si quis servum alienum, &c.* Caus. XVII. Quaest. IV. Can. XXXVII. See also the following Canon, and what has been said above, *B. II. Chap. V. § 29. in fin.* GROTIUS.

VII. (1) Our Author's Principles do not agree very well in this Place. For if the Slave, of whom he speaks, may run away, I do not see, why he may not resist his Master, and even kill him, when he has it in his Power, in order to deliver himself from Slavery; since if there be no Engagement on his Side, the State of War subsists always between him and his Master. See the following Note.

2. No doubt he may, if he was not bound by any Engagement to his Master. But the Magistrate supposes or ought to suppose, a real Agreement by which the Slave is bound; and that is the reason, why he may be obliged to deliver him up to the Master, who reclaims him, without putting himself to the Trouble of examining, whether the War, in which the Slave was taken, was just or unjust.

it is from the Law of Nations that that Magistrate ought to defend the Lord in that Right, and in the Exercise of it. This Right therefore is like that, which we have elsewhere³ allowed to the Chief Magistrate in every State, whom the Subjects can never in Conscience resist. Therefore St. *Augustin* joins them both together, when he says,⁴ *Subjects should so bear with their Sovereigns, and Slaves with their Lords, that by suffering these temporal Evils with Patience, they may hope for eternal good Things.*

VIII. But this also we must observe, that this Law of Nations concerning Prisoners, has not been at all Times, nor among¹ all Nations received, tho' the *Roman* Lawyers call it General, thus giving the Name of Whole to the most known and most considerable Part. So among the *Hebrews*, who had peculiar Laws, whereby they were separated from the Commerce of other Nations, there was a Place of Refuge^a for Slaves, that is, for those (as the Interpreters well observe) who² became so by their Misfortune, not their Crime; on which that Privilege seems grounded among the *French*, given to Slaves to enter again on Possession of their Liberty, the Moment they come into the Dominions of that Kingdom, which is also now allowed, not only to those taken in War, but to all others whatever.

VIII. *That this Right is not allowed in all Nations.*

^a *Deut.* xxiii. 15. See *precep. vetant.* 109.

3. *B. I. Chap. IV.* But there also we have shewn that our Author carries the Obligation of Non-resistance to Sovereigns too far.

4. The Passage has already been cited in the same Place § 7. *Num.* 8. *Note* 31. I find since, that our Author in reciting it in his Treatise *De imperio Summarum Potestatum circa Sacra*, Cap. III. § 6. gives it as St. PROSPER's, *Sentent.* XXXIV. ex AUGUSTIN. in *Psalmum* CXXIV. but adds he, *non ad verbum*, that is to say the Sense is in that Father, tho' not the express Terms of the Passage.

VIII. (1) Amongst the *Indians* there were no Slaves. STRABO, *Geograph.* Lib. XV. p. 1036. *Edit. Amstel.* (710. Paris.) GRONOVIVS cites this Example.

2. This is a meer Supposition. The Law is general, and relates to all Slaves, that is to say, the Slaves of other Nations. See Mr. LE CLERC's Commentary upon it. So that this Law may be considered as one of those, wherein GOD used his Right of Sovereignty over the Goods of Men; by which the *Israelites* were excused from restoring foreign Slaves to those to whom they belonged.

IX. *Nor now among Christians, and what is introduced in its stead.*

IX. 1. But among Christians ¹ it is generally agreed, that being engaged in War, they that are taken Prisoners, are not made Slaves, so as to sell them or force them to hard Labours, or to such Miseries as are common to Slaves, and that with Reason; for they are, or should be better instructed by the great Recommender of every Act of Charity, than not to be diverted from the killing of unhappy Persons, unless they may be allowed the Exercise of a somewhat less Cruelty. ² And *Gregoras* declares <608> it is a continued Custom among those of the same Religion, nor was it peculiar to them who lived under the *Roman* Government, but was common to the *Thessalians*, *Illyrians*, *Triballians* and *Bulgarians*. And this at least (tho' but a small Matter) is an Effect of the regard Men have to the Christian Religion, which *Socrates* ³ in vain attempted to have introduced among the *Grecians*. †

IX. (1) And before them the *Essenes*, from whom the first Christians derived their Original, according to JOSEPHUS. GROTIUS.

The *Jewish* Historian speaks of a Sort of *Essenes*, who believe, says he, that there was some Injustice in having Slaves. *Antiq. Jud.* Lib. XVIII. Cap. II. p. 618. B. What our Author lays down, as a Fact in regard to the Origin of the first Christians, is besides a mere Conjecture.

2. 2 B. IV. where are these Words, *It is a Custom delivered without Corruption from the Antients to Posterity, that it was lawful not only for the Graeco-Romans and Thessalians, but for the Illyrians, Triballians and Bulgarians, because they were of the same Faith, to seize upon the Goods indeed as Spoils, but not to take the Men Prisoners of War, nor kill them, when the Battle was over.* Adam Bremen of *St. Ansgarius*, returning from thence to Hamburg, rebuked the Nordalians for selling the Christians. This Custom BOER. speaks of *Decis.* 178. and adds, it is observed in France, *England* and *Spain*, that if a *Duke*, *Count* or *Baron* was taken, he does not belong to the Soldiers, but to the Prince who makes War. GROTIUS.

3. Our Author cites here in the Margin one of PLATO's Dialogues, wherein that Philosopher, whom he supposes in this to have followed his Master's Doctrine, establishes for one of the Laws of his Republick, that no *Greek* should make Slaves of those of his own Nation, nor advise other *Greeks* to do so: *De Legib.* Lib. p. 469. C. Vol. II. *Edit. H. Steph.*

† [[This translation of the sentence invites misunderstanding. The original runs *Atque ita hoc saltem, quanquam exiguum est, perfecit reverentia Christianae legis quod cum Graecis inter se servandum olim diceret Socrates, nihil impetavit:* that is, "In this way, even though to a small degree, reverence for the Christian religion brought about what Socrates in vain urged the Greeks to practise amongst themselves," i.e., the abolition of slavery within their own community.]]

2. And what Christians in this Case observe among themselves, ⁴ the *Mahometans* likewise do among themselves. Yet even among Christians this Custom still continues, that those taken in War are kept till their Ransom ⁵ be paid, which is set at the Pleasure of the Conqueror, unless it be otherwise agreed upon; but this Right of keeping Prisoners is usually granted to the Captors, except they be Persons of considerable Rank, to whom the State only, or its chief Magistrate has a Right, according to the Custom of most Nations.

4. See CHALCOCONDYLAS, *Rerum Turcic.* Lib. III. LEUNCLAVIUS, *Lib.* III. and XVII. BUSBEQU. *Epist. exotic.* III. (p. 162. Edit. Elzevir 1662.) GROTIUS.

5. See upon this Subject a Dissertation of the late Mr. HERTIUS, *De Lytro*, in the first Volume of his *Comment. & Opuscul. &c.* p. 253. & seqq.

Of Empire over the Conquered.

I. *That Sovereignty, whether in a King, or People, may be acquired by War; and the Effects of such an Acquisition.*

I. I. No wonder that he who can bring into Slavery every particular Person of the Enemies Party, that falls into his Hands, (as we have shewn in the preceding Chapter) may ¹ also impose a Subjection upon the whole Body, whether it be a State, or part of a State; whether that Subjection be merely Civil, merely despotical or mixt. *Seneca* makes Use of

I. (1) Provided there be on the Side of the Conquered either an express or tacit Consent. And in that Case the Acquisition is deemed lawful, whether the War was just or unjust; as I shall explain below, *Chap. XIX. § II. Note 1.* Compare this Place with PUFENDORF, *B. VII. Chap. VII. § 5.* and what Mr. CARMICHAEL, Professor at *Glasgow*, says in his Notes upon the Abridgment *De Officio Hom. & Civ. Lib. II. Cap. X. § 2.* and *Cap. XVI. § 14.* The late Mr. COCCEIUS, has however maintained, that, in a just War, the Victor acquires an entire Right of Sovereignty over the Vanquished, by the sole Right of Conquest, independently of all Convention, and that, even tho' the Victor has otherwise obtained all the Satisfaction and Amends he could require. The principal Reason this Doctor makes Use of to prove his Opinion is, that otherwise the Conqueror could not be assured of the peaceable Possession of what he had taken, or forced the Conquered to give him, for his Pretensions; since they might retake it from him by the same Right of War. See the Dissertation, *De jure Victoriae diverso a jure Belli*, § 23. But an Author of the same Nation, Mr. FREUER [*sic*: TREUER]], Professor of Politicks and Ethicks at *Helmstadt*, has refuted this Opinion in his Notes upon PUFENDORF, *De Offic. Hom. & Civ. Lib. II. Cap. XVI. § 13.* The Reason alledged proves only, that the Victor, who has possessed himself of an Enemy's Country, may command in it, whilst he holds it, and not resign it, till he has good Security, that he shall either obtain, or possess without Hazard, what is necessary for the Satisfaction and Amends he has a Right to exact by the Methods of Force. But the End of a just War does not always demand of itself, that the Conqueror should acquire an absolute and perpetual Right of Sovereignty over the Conquered. It is only a favourable Occasion of obtaining it, and for that Purpose there must always be either an express or tacit Consent of the Conquered; otherwise the State

this Argument in the Controversy *De Olynthio*,² he <609> had been taken by Right of War; he is my Slave by Purchase. It is your Interest, O Athenians, to maintain me in my Rights: Otherwise your Dominion must be confined within its former Bounds, by restoring what you have gained by War. Wherefore *Tertullian*³ owns, that Empires are gained by Arms, and enlarged by Conquests. So *Quintilian*,⁴ Kingdoms, Nations, the Bounds of Cities and Countries are determined by the Right of War. *Alexander* in *Curtius*⁵ says, that Laws are imposed by the Conqueror, and received by the Conquered. A Favourite (of *Antiochus*) in his Oration to the Romans,⁶ Why do you send every Year your Praetor with the Ensigns of Empire, the Rods and Axes, unto Syracuse, and other Greek Cities in Sicily? Truly you can say nothing else, but that having subdued

of War still subsisting, as is granted; the Sovereignty of the Victor has no other Title, but that of Force, and continues no longer than the conquered People are incapable of throwing off the Yoke. All that can be said is, that the neutral Powers, as being such, may and ought to look upon the Conqueror, as the lawful Possessor of the Sovereignty, even tho' they should believe the War unjust on his Side; and that without the Necessity of supposing here, with our Author, an arbitrary Law of Nations.

2. *Servus, inquit, est meus, quem ego emi belli jure; vobis Athenienses, expedit: Alioquin imperium vestrum in antiquos fines redigitur, quidquid est bello partum, et est contra. At ille, &c.* Controvers. Lib. V. Contr. XXXIV. p. 390. Edit. Gron. Major. Tho' the Sense of this Passage is sufficiently clear, the Words are however corrupted, as the learned Commentator JOHN SCHULTING remarks, who conjectures with Probability enough, that it ought to be read: *Servus, inquit, est meus, quem ego emi belli jure. Id tueri vobis, Athenienses, expedit: Alioquin—redigitur; quidquid est bello partum perdetis. Contra ait: Ille, &c.* It seems to me only that after *belli jure, captum* ought to be read, or some Term of the same Sense, as I have expressed it in my Translation; for it is not by the Right of War, that the Painter bought the Slave; but the Validity of the Purchase was founded upon the Seller's possessing the Slave by the Right of War. For the Rest, the reasoning contained in those Words amounts to that of our Author, by the Reason of Contraries. For the Painter means, if Prisoners of War are not lawfully acquired by those who take them, neither can a Conqueror lawfully become Master of a People by the Right of Conquest.

3. *Ni fallor enim, omne Regnum, vel Imperium, bellis quaeritur, & victoriis propagatur.* Apologetic. Cap. XXV.

4. *Sed hinc aspera & vehemens quaestio exoritur de jure Belli, dicentibus Thessalis, hoc regna populos fines gentium atque urbium contineri.* Instit. Orat. Lib. V. Cap. X. p. 431. Edit. Burman.

5. *Leges autem a victoribus dici, accepi a victis,* Lib. IV. Cap. V. Num. 7.

6. *Cur Syracusas, &c.* Lib. XXXV. Cap. XVI. Num. 3.

them by Arms, you impose these Laws upon them. And Ariovistus⁷ in Caesar's Commentaries says, that by the Law of Arms the Conqueror may govern the Conquered as he pleases. And again, The Romans govern those whom they have conquered, not after the Prescriptions of others, but according to their own Pleasure.

2. Justin tells us out of Trogus,⁸ that Princes that made War before Ninus, sought not Empire, but Glory, and being contented with the Victory, did not reduce their Enemies under their Dominion. That Ninus was the first who enlarged the Bounds of his Empire, and subdued other Countries by War, and from him it became a Custom. Bocchus argues in Salust,⁹ That he took up Arms to defend his Kingdom, for that Part of Numidia, from whence he had beaten Jugurtha, was become his own by the Right of War.

3. But Sovereignty may be acquired by Conquest, either so far as it was¹⁰ in the King, or another Governor, and then all the Power he had

7. *Ad haec Ariovistus respondit, &c.* De Bell. Gall. Lib. I. Cap. XXXVI.

8. *Fines imperii tueri magis, &c.* Lib. I. Cap. I. Num. 3. & seqq.

9. *Se non hostili animo, &c.* De Bell. Jugurth. Cap. CX. p. 506. Edit. Wass.

10. Alexander the Great after the Battle of Gaugamela (otherwise called the Battle of Arbela) was saluted King of Asta. PLUTARCH, in *Vit. Alex.* p. 685. B. Vol. II. Edit. Wech.

The Romans appropriated to themselves by the Right of War, (πολέμου νόμω) the Countries which had belonged to King Syphax. APPIAN ALEXAND. *Excerpt. Legat.* X. Num. 28. The Embassadors of the Goths, as AGATHIAS relates, told Theodorick, one of their Kings, that having overcome Odoacer, a Stranger, of Scyros, he was become Master of all his Dominions, by Right of War: Ἄλλ' Ὀδοάκρον καθελὼν τὸν ἐπηλύτην τὸν Σκύρρηνον (as it must be read instead of Τύρρηνον) τᾶκείνου ἅπαντα κατέσχε τῷ τοῦ πολέμου θεσμῷ. *Hist.* Lib. I. (Cap. IV. p. II. Edit. Vulcan.) But MENANDER the Protector informs us, that when the Huns pretended to have conquered the Gepidae, because they had taken their King, the Romans denied it, averring the Chief of the Gepidae was a Prince rather than a real King, and that therefore the Gepidae were not his, as a patrimonial Estate. GROTIUS.

In the Passage of AGATHIAS, the antient Version of CHRISTOPHER PERSONA a Roman, printed at Ausburgh in 1519. has, *Et peregrino strenue debellato Tyranno*: From whence it appears, that the Translator read τύρηννον in his Original, instead of Τύρρηνον. Our Author, citing this Passage above, probably by Memory, (*Chap.* VI. of this Book, § 2. Note II.) says πολέμου νόμω, for θεσμῷ.

passes to the Conqueror, and no more. Or ¹¹ as it is in the People, and then the Conqueror has the same Right to alienate it as the People had, and thus Kingdoms become patrimonial, as I have said elsewhere, *B. I. Chap. III. § II. <610>*

II. I. And yet a Sovereignty may be more absolutely acquired, as that which before was a State may cease to be a State; which may be done, either by adding it to another State, as the *Roman* Provinces were, or without any such Incorporation, when a King making War ¹ at his own Charge conquers the People, so as to govern them not for their Profit, but chiefly his own Interest, which is the Character of despotic Power in Opposition to civil Government. *Aristotle* ² says, *There is a Government for the Benefit of the Sovereign, and another for the Advantage of the Subject, the one takes Place among free Men, the other between Masters and Slaves.* The People then under this Government, for the future, are not a State, but a Multitude of Slaves; for it was well said of *Anaxandrides*, ³

II. *An Empire may be acquired over the People that is despotic, and then they cease to be a State.*

II. The *Persians*, as the same *MENANDER*, cited in the foregoing Note relates, maintained, that the Territory of the City of *Daros* belonged to them, because they had conquered that City: *Belisarius*, after having defeated the *Vandals*, insisted that the City of *Lilybaeum* in *Sicily* should become dependent upon the *Roman* Empire, because the *Goths* had given it to the *Vandals*: But the *Goths* denied their having given it to them, as we find in *PROCOPIUS*, *Vandalic*. Lib. II. (Cap. V.) *Henry* the Son of the Emperor *Frederick Barberossa*, after having taken *Sicily*, claimed also the Cities of *Epidamnum*, *Thessalonica*, and other Places possessed by the *Sicilians*: *NICETAS*, Lib. I. De *Alexio Isaaci* fratre, (Cap. IX.) *Bajan*, Chagan (or Prince) of the *Avari*, told the Emperor, that the City of *Sirmium* was his, because it had belonged to the *Gepidae*, whom the *Avari* had conquered. *MENANDER*, *Protector*, (Cap. III. *Legat. Justin. Justinian & Tiber.*) *Peter*, *Justinian's* Ambassador, told *Chosroez*, King of *Persia*, that he who is Master of the Principal, ought to be so of the Accessory; and that therefore *Suania* was conquered with the *Lazi*, as the *Suanians* and *Lazians* agree that the latter had formerly been in Subjection to the former. *Apud eundem*, (Chap. III.) See above, § 4. *GROTIUS*.

II. (1) See above, *B. I. Chap. III. § 12. Num. 2.*

2. *Politic*. Lib. VII. Cap. XIV. p. 442. D.

3. (*In Anchis*. Excerpt. Vett. Comic. & Frag. p. 639.) *TACITUS* says: *Addiditque praecepta* [*Claudius Caesar*]*—ut non dominationem & servos, sed rectorem & cives cogitare.* *Annal. Lib. XI. (Cap. XII. Num. 2.) GROTIUS.*

Οὐκ ἔστι δούλων, ὦ' γαθ', οὐδαμοῦ πόλις.

My Friend, a State is not made up of Slaves.

2. And Tacitus thus opposes civil Government to arbitrary Power. And Xenophon of Agesilaus, ὀπόσας δὲ πόλεις προσαγάγοιτο, &c. ⁴ *Whatever Cities be subdued, be excused them from all servile Offices, and required no more Obedience than what a free People pay their Prince.*

III. Sometimes
a mixt Govern-
ment is
acquired.

III. And hence we may understand, what a mixt Sovereignty is between the despotick and the civil, namely, when Slavery is mixt with a kind of personal Liberty. Thus we read some People have their Arms taken away, and that they should use no other ¹ Instruments of Iron, but what were necessary for Husbandry: ² Others forced to change their Language and Method of living.

IV. That even
the incorporeal
Things may be
acquired by

IV. 1. But as the Goods of every particular Prisoner, by the Right of War, belong to the Captors, so the Goods of the People in general belong to the Conquerors, if they please. For what Livy said of those that surren-

4. *De Agesil.* (Chap. I. § 22. *Edit. Oxon.*) GROTIUS.

III. (i) This in a Treaty of Peace granted by Porsenna, King of Etruria, to the Romans, after they had expelled their Kings, there was an express Clause, that the Romans should not have any Instruments of Iron, but for the Uses of Agriculture. *In foedere, quod, expulsis regibus, &c.* PLINY, *Hist. Natur.* Lib. XXXIV. Cap. XIV. Our Author quotes this Example himself in a Note upon the first Book of SAMUEL, Chap. XIII. Ver. 19. where he thinks a like Method is spoke of, which the Philistines used for disarming the Israelites. But it seems probable, that it was in a different Manner; the Reader may see Mr. LE CLERC's Commentary upon it. The Roman Historians have passed over in silence this Circumstance of the Treaty between Porsenna and the Romans, as shameful to a People, who were afterwards Masters of the World; as our Author observes in the same Place. To this may be added a Note of FREINSHEMIUS upon FLORUS, *Lib. I. Cap. X. Num. 2.*

2. The learned GRONOVIVS introduces here very properly the Example of the Lydians, from whom Cyrus, after having conquered them, took away their Arms and Horses, obliging them at the same Time to frequent Taverns, Places of Diversion, and bawdy Houses: *Quibus [Lydis] iterum victis, arma & equi ademti, jussique cauponias & ludicras artes, & lenocinia exercere.* JUSTIN. *Lib. I. Cap. VII. Num. 12.* See Mr. BERNEGGER's Note upon this Passage, who adds other Examples.

dered themselves, ¹ *When all Things are given up to the Conqueror, it is wholly in his own Power and will to take what he pleases to himself, and to leave them what he has a mind;* the same may be said of those conquered in a solemn War. For a Surrender doth but voluntarily yield up, what would otherwise be taken away by Force. So *Scaptius* in *Livy*² says, *That the <6II> Lands in dispute were Part of the Territory of Corioli, which being taken, by the Right of War, they became then the Romans.* And *Hannibal* in the same Author thus encourages his Soldiers in his Oration before the Battle, ³ *Whatsoever the Romans have by so many Victories got, and heaped up, shall, together with themselves the Masters of it, be ours upon the Victory.* And thus ⁴ *Antiochus* pretended, that *Seleucus* having subdued all the Dominions of *Lysimachus*, those Countries belonged to him (*Antiochus*) as Conqueror of *Seleucus*. So all that *Mithridates* had taken in War, and added to his own Dominion, ⁵ *Pompey* (by beating him) made the *Romans*.

War, where is handled a Question concerning the Thessalian Bond.

2. Wherefore even those incorporeal Rights, which belonged to the State, shall become the Conqueror's, as far as he pleases. So upon the subduing *Alba*, all the Rights of the Citizens were ^a claimed by the *Romans*: Whence it follows, that the *Thessalians* were entirely discharged from the Obligation of an hundred Talents ⁶ which they owed to the

^a *Dion. Hal.*
l. 3. c. 31.

IV. (1) See above, *B. I. Cap. III. § 8.* and *B. II. Cap. V. § 31.* and in this *B. Cap. V. § 2.* and afterwards, *Cap. XX. § 49.* Add also the Extracts of *POLYBIUS, Legat. CXLII. they that yield themselves to the Romans, do first give up their Country and the Cities therein, besides all the Men and Women that are in the Country or the Cities. Also all the Rivers and Ports, and in general all Things Sacred and Religious: So that the Romans become Lords of all, and those that surrender themselves have nothing that they can call their own.* See what has been said above, *B. I. Cap. IV. § 7.* *JUSTIN, B. XXXV.* speaking of the *Jews*, says, afterward, with the *Persians* they fell into the Power of *Alexander the Great.* *GROTIUS.*

2. *Agrum, de quo ambigitur, &c.* *Lib. III. Cap. LXXI. Num. 6.*

3. *Quidquid Romani tot triumphis. &c.* *Idem, Lib. XXI. Cap. XLIII. Num. 6.*

4. *Quo [Lysimacho] victo, quum omnia, &c.* *LIVY, Lib. XXXIII. Cap. XL.*

5. See *STRABO, Geograph. Lib. XII. (p. 815. Edit. Amstel. 541. Paris.)*

6. See *PUFENDORF, Law of Nature and Nations, B. VIII. Chap. VI. § 20.* and what our Author says in the following Chapter, § 9. *Num. 2.* Mr. *CARMICHAEL*, Professor at *Glasgow*, says in his Notes upon the Abridgment *De Officio Homin. & Civis, Lib. II. Cap. XVI. § 14.* that the Advantage of the Discharge, in the Case under Consideration, can hardly be extended to beneficent Contracts, or such as have been en-

Thebans, when *Alexander the Great* having conquered the *Thebans*, had as their Lord by the Right of Conquest forgiven the Debt. Neither is that perfectly true, which *Quintilian*⁷ alleges in behalf of the *Thebans*, that what he takes only belongs to the Conqueror, that the Right which is incorporeal cannot be seized on; that the Condition of an Heir is one Thing, and that of a Conqueror another; because the Right passes to the one, and the Thing to the other: For he that is Master of the Persons, is also of the Things, and of the Rights belonging to them. He that is possessed by another,⁸ can be in Possession of nothing in his own Name, and when one is under the Power of another,⁹ he has nothing in his own Power.

3. Yea, tho' the Conqueror leave to the Conquered *Jus Civitatis*, the form of a State, yet may he take to himself some Rights that belonged to it. For it is in his Power to limit his own Bounty as he pleases. *Caesar* imitated *Alexander*, in forgiving a Debt^b to the *Dyrrachians*, which they owed to some of the contrary Party. But here it may be objected, that the War of *Caesar*¹⁰ was not of the same Kind, concerning which this Law of Nations was instituted.

^b *Cicer. Epist. ad Brut. VI.*

tered into solely for the Debtor's Benefit. So that it does not suffice, according to this Author, that the Conqueror discharges those of such a Debt owed to the Conquered. But if the Neutrality, which dispenses with the Debtor's examining into the Justice of the War and of the Conquest, lays him under the Obligation of paying the Conqueror, and thereby discharges him with regard to the Creditor, to whose Rights the Conqueror is deemed to succeed: I do not see why the same Thing should not take Place in the Case of a Donation, or an *Acceptilation*. What Generosity or Humanity requires is foreign to the Question: But as to Right, properly so called, that is certainly the same in both Cases.

7. *Tum secundo gradu, &c.* Institit. Orat. Lib. V. Cap. X. p. 432. Edit. Burman.

8. *Qui in servitute est, usucapere non potest, nam, quum possideatur, possidere non videtur.* Digest, Lib. L. Tit. XVII. De diversis Reg. Juris, Leg. CXVIII.

9. *In sua enim potestate non videtur habere, qui non est suae potestatis,* Lib. XLVIII. Tit. V. *Ad Leg. Jul. de Adulteriis coecondendis,* Leg. XXI.

10. *Antony* commanded the *Tyrians* to restore what they held belonging to the *Jews*, not granted by the Senate, and possessed before the War of *Cassius*, as *JOSEPHUS* relates. See also *BIZAR. Genuens. Histor.* Lib. X. *GROTIUS.*

Of the Right of Postliminy.

I. 1. As the Lawyers of latter Ages have writ almost nothing reasonably of Things taken from Enemies, so neither have they of the Right of Postliminy. This Subject has been treated of by the old *Roman* Lawyers somewhat more accurately, but oftentimes too confusedly; so that the Reader could not well distinguish, what they attributed to the civil Law, and what to the Law of Nations.

I. *The Original of the Word Postliminium.*

2. The Opinion of *Servius Sulpicius* of the Word *Postliminium*, is to be rejected, who takes the latter Part of it to be only an Extension of no Signification; but that of *Scaevola* to be approved, who compounds ¹ it

I. (1) As *CICERO* informs us, who recites both Etymologies: *Sed quum ipsius Postliminii vis quaeritur, & verbum ipsum notatur: In quo Servius noster, ut opinor, nihil putat esse notandum, nisi post, & liminium illud, productionem esse verbi vult, ut in finitimo, legitimo, aeditimo, non plus inesse timum, quam in Meditullio, tullium. SCAEVOLA autem P. F. junctum putat esse verbum, ut sit in eo & post, & limen: Ut quae a nobis alienata sunt, quum ad hostem pervenerint, & ex suo tamquam limine exierint, dein quum redierint post ad idem limen, postliminio videantur rediisse. Topic. (Cap. VIII.)* For this Reason *TERTULLIAN* used the Word *Postliminium* in a metaphorical Sense, to express the return or Re-establishment, by which a Sinner is received into the Peace of the Church: *Incesto fornicatori postliminium largitus pacis Ecclesiasticae &c.* De Pudicitia, *Cap. XV.* *FESTUS* says in regard to *Limen*: *LIMUS, obliquus id est, transversus: Unde & LIMINA.* See also *SERVIVS*, upon the twelfth Book of the *Aeneid*, (Ver. 120.) and *DONATUS* upon the Eunuch of *TERENCE*, *Act. III. Scen. V.* (Ver. 53.) *ISIDORUS* says with respect to *Limes & Limen*: *LIMITES adpellati, antiquo verbo transversi. Nam transversa omnia antiqui Lima dicebant: A quo & limina ostiorum, per quae foris & intus itur; & limites quod per eos foras in agros eatur. Orig. Ling. Lat. Lib. XV. Cap. XIV.* And in the old Glossary, (published by *HENRY STEPHENS*.) *Limes* is explained by *Πλαγία ὁδός*. *GROTIUS*.

The Passage of *SERVIVS* referred to by our Author in this Note, but without mark-

of *Post*,² that may signify a Return, and *Limen*, which signifies Frontiers; for *Limen*, and *Limes*, differ only in Termination and manner of declining, for they are both derived from the old Word *Limus*, that signifies oblique, or across, and in the primitive Notion are the same; as *Materia* and *Materies*, *Pavus* and *Pavo*,³ *Contagio* and *Contages*, *Cucumis*, and *Cucumber*; tho' afterwards, *Limen* was particularly applied to the Entrance of private Dwellings, and *Limes* to that of the Lands of the State. So the Antients called banishing of a Person *Eliminare*, and Banishment they termed⁴ *Eliminium*, *thrusting out of their Bounds, or Limits*.

ing the Verse where it is found, tends to prove that *Limus* signifies *oblique, what goes across*. And the Grammarian speaks of it upon Occasion of a Word of the Poet, which some Antients believed corrupted *Lino*, instead of which they were for reading *Limo*, the Ablative of *Limus* taken as a Substantive. And by *Limus* they understood a Kind of Vestment bordered with watered Purple, which reached from the Navel down to the Feet. This, by the way, is a Word omitted in the Dictionaries, tho' found in the Grammarian, who has commented upon VIRGIL, and in ISIDORUS, who informs us further that this Vestment was peculiar to the Slaves of the Publick. See also HYGINUS, *De limitib. constituendis*, p. 151. and the Notes of the late Mr. GOES upon him, p. 162, 163. as also LAURENT. PIGNORIUS, *De Servis*, p. 29, 30. *Edit. Patav.* 1656. As to the Word *Limen*, which our Author believes to have signified of old the same as the Word *Limes*, following a Remark contained in a Passage of the *Institutes*, which will be cited upon the next Paragraph, *Note 2*. The learned SALMASIUS has taken upon him to refute this Opinion in his *Observationes ad jus Atticum & Romanum*: And MENAGE agrees with the latter in his *Amoenitates Juris Civilis*, Cap. XXXIX. p. 331. *Edit. Lips.* But as Mr. SCHULTING observes, upon the *Institutions* of CAJUS, *Lib. I. Tit. VI. § 2.* p. 49. the very Passages, alledged by MENAGE, prove, that the Word *Limen* was used to express the Frontiers or Bounds of a State, by other antient Authors, than those followed by TRIBONIANUS.

2. From whence came the Name of a Goddess, called *Postvorta*. GROTIUS.

She was one of the Goddesses who presided at the Birth of Children. See AULUS GELLIUS, *Noct. Attic. Lib. XVI. Cap. XVII.*

3. *Compago* and *Compages*, a *Joint*, which was formerly *Compagen*, as the Genitive Case shews, and the Verb derived from it, (*Campagino*, to *join*) as also *sanguis*, was formerly *sanguen*, *Blood*. GROTIUS.

4. And *Colliminius*, a Word which may be found in SOLINUS, (*Cap. XV. or XXV.* according to some Editions) instead of *Collimitium*, which is commonly used. GROTIUS.

II. I. Therefore the Right of *Postliminy* is that which ariseth from a ¹ return to ² the Frontiers, that is, the Territories of the State. *Pomponius* ³ says, that a Man has this Right of Return, the Moment he enters into any Place, that the State is Master of. *Paulus*, ⁴ when he is entered our Bounds, or Territories. But from a Parity of Reason, the general Consent of Nations has extended the Thing further, so that this *Postliminium* (or Right of Return) should take Place, even as soon as a Person (or any Thing capable of this Right) should come safe to our Friends, as *Pomponius* ⁵ has it in the aforesaid Place; or as *Paulus* ⁶ explains it by way of Ex-ample, to a King in Alliance or Friendship with us; (where Friends, ⁷ or Allies, are not to be taken simply for those with whom we are at Peace, but those who join with us in the same War) unto whom they who shall arrive, are to be safe, as *Paulus* speaks, upon the publick Account; for it is all one, whether Person, or Thing, escape to these, or to his own Countrymen.

II. Where this Right takes Place.

2. But among those who are Friends, but not engaged in the same Party, Persons taken in War, change not their Condition (of Captivity) unless by a special Article and Agreement, as it was stipulated ⁸ between the *Romans* and *Carthaginians*, in their second Treaty, that if any of the Friends of the *Romans*, being taken by the *Carthaginians*, should escape

II. (1) That is to say a Right, in Virtue whereof, the Things, and Persons, taken by the Enemy, return to their first State: The Person recovering their Rights, and the Things returning to their former Masters.

2. *Dictum est autem Postliminium, &c.* Institut. Lib. I. Tit. XII. Quibus modis jus patriae potestatis solvitur, § 5.

3. *Tunc autem reversus intelligitur, si aut ad amicos nostros perveniat, aut intra praesidia nostra esse coepit.* Digest, Lib. XLIX. Tit. XV. De Captivis & Postliminio, &c. Leg. V. § 1.

4. *Postliminio rediisse videtur, quum in fines nostros intraverit: Sicuti amittitur, ubi fines nostros excessit.* Digest, Lib. XLIX. Tit. XV. De Captivis & Postliminio, &c. Leg. XIX. § 3.

5. See Note 3. upon this Section.

6. *Sed & si in civitatem sociam amicumve, aut ad regem socium vel amicum, venerit, statim postliminio rediisse videtur: Quia ibi primum nomine publico tutus esse incipiat.* Ibid. Leg. XIX. § 3.

7. The King of *Morocco* and *Fez* understood so, according to THUANUS, *Hist.* Lib. CXXX. upon the Year 1603. GROTIUS.

8. POLYBIUS, *Lib.* III. *Cap.* XXIV. *p.* 248. Edit. Amstel.

into any Ports subject to the *Romans*, they should obtain their Liberty, the like Provision being made for the Friends of the *Carthaginians*.⁹ Therefore the *Romans*, who being taken in the second Punick War, and sold as Slaves, were come from Master to Master into *Greece*, could not be admitted to this Right of *Postliminy*, because the *Greeks* were Neuters in that War; there was therefore a Necessity of their being ransomed, before they could be set at Liberty. We also read in *Homer* of several Persons taken in War, sold into such Countries as were at Peace, as *Lycæon*, *Iliad*, (*Lib.* XXI.) and *Eurymedusa*, *Odys.* *Lib.* VII.

III. *That some Things return, and some are recovered by this Right of Postliminy.*

III. According to the antient Language of the *Romans*, even free Men were said to be recovered by Right of *Postliminy*. *Gallus Aelius*, in his first Book of the Significations of Law Terms, saith, *That a free Man who went from one City to another, and afterwards returned to that City, was first said to be recovered by the Right of Postliminy. Also a Slave taken Prisoner, by the Enemy, if he afterwards returns to us, returns to the Obedience of his old Master by Right of Postliminy. A Horse, a Mule, and a Ship, have the like privilege of Postliminy*, in *postliminii receptu*, (thus I judge those three Words with little Alteration may be retained, which *Jacobus Cujacius*, a Man incomparable for his Study of the *Roman Law*, would have left out) *as a Slave: What kinds of Things do return to us by this Right of Postliminy, the same may return from us to our Enemies*. But the modern *Roman Lawyers* have with more Exactness distinguished two Kinds of *Postliminy*,¹ *viz.* when we either return, or recover something.

IV. *This Right of Postliminy is of Force in Peace and*

IV. I. The Opinion also of *Tryphoninus*¹ is allowable, who says this Right of *Postliminy* takes place in War, or Peace; in a Sense somewhat different than *Pomponius*² expressed it. This Right of *Postliminy* in Peace (unless

9. VAL. MAX. *B. V. Cap.* II. 6. DIOD. SIC. *Excerpt. Legat.* Note 3. So the *Rhodians* freely restored to the *Athenians*, what *Athenian* Citizens they had bought in *Philip's* War. POLYBIUS, *Excerpt. Legat.* III. GROTIUS.

III. (1) *Quum duae species postliminii sint, ut aut nos revertamur, aut aliquid recipiamus, &c.* Digest, *Lib.* XLIX. *Tit.* XV. De Capt. & Postlimin. &c. *Leg.* XIV. *Princ.*

IV. (1) *In bello Postliminium est, &c.* Ibid. *Leg.* XII. *Princ.*

2. See below, § 18. of this Chapter, *Note* 4. where the Law is cited.

it be otherwise stipulated) belongs ^a to those who were not overcome in War by force of Arms, but were by their own Misfortune surprized, as found in the Enemies Country, when the War suddenly broke out. But there is no Benefit of Postliminy to the other Prisoners in Time of Peace, ³ unless it were comprised in the Treaty of Peace: As the most learned ⁴ *Peter Faber* judicially corrects that Place of *Tryphoninus*, not disap-
 <614>proved by *Cujacius*; the Solidity of which Correction appears, as well by the Reason that follows immediately after, as by the Opposition to what goes before. *The Peace was made, and the Prisoners released* (saith ⁵ *Zonaras*) *for so it had been agreed upon*. So *Pomponius*, ⁶ *If the Prisoner, concerning whom, it was comprehended in the Articles of Peace, that he*

War, and what if nothing be said in Peace.

^a See *Paruta, De Bell. Cypr.* l. 1.

3. See *JOSEPHUS, Antiq. Hist.* XIII. 2. *POLYBIUS* tells us, that in the Treaty of Peace which the *Romans* made with *Philip* King of *Macedon*, in that with the *Aetolians*, in which however there was some Exception, and in that with *Antiochus*, it was agreed that all Prisoners on either Side should be restored, *Excerpt. Legat.* IX. 28, 35. *LIVY* has the same Examples, and adds that of the Peace with *Nabis*. There are some also in *ZOSIMUS*. The Peace of *Probus* with the *Vandals* and *Burgundians* runs thus, *That all the Prey which they had taken, and all the Prisoners, should be restored*, B. I. He also relates a like Peace made by *Julian* with the *Germans* in general, also with the *Quadi*, that were in *Germany*, B. III. (Cap. VII. where there is no such Thing.) *AMMIANUS MARCELLINUS*, of *Suomarius*, King of the *Almains*, or *Germans*; *he begged Peace on his Knees, and he obtained it with the Forgiveness of what was passed, upon this Condition, that he should restore our Prisoners*. Again of the *Sarmatians*, *being ordered to get dwelling Places, they without Fear delivered up our Prisoners*. He again says the same of another Part of the *Sarmatians*. And many such in *ZONARAS*, among the Rest, in the Affairs of *Michael* Son of *Theophilus*, speaking of the *Bulgarian* Prince, he says, *He set the Prisoners at Liberty*. *NICETAS*, B. II. says, that Liberty was given to all the Prisoners, except to the *Corinthian* and *Theban* Men and Women. Sometimes it is agreed, that the Prisoners should be restored that properly belonged to the State, as it is in *THUCYDIDES* V. *GROTIUS*.

4. It is not necessary to recur to the Correction of *PETER FABER*, which our Author adopts. The illustrious Mr. *BYNKERSHOEK* has shewn in a very clear manner, that when the Civilian says (in the Passage referred to in *Note 1.*) *In pace postliminium est his, qui bello capti erant, de quibus nihil in pactis erat comprehensum*; he means those, he speaks of afterwards, who were made Prisoners, only from being unfortunately upon the Lands of the Enemy in the beginning of an unforeseen War. See that great Lawyer's *Observations*, Lib. I. Cap. XX. and the Law cited above in this Book, *Chap. VI.* § 12. *Num. 1.*

5. As in *Note 3.* The Passage is in *Vol. III.* of *ZONARAS*.

6. *Si captivus, &c.* *Digest, Lib. XLIX. Tit. XV. De Capt. & Postl. &c. Leg. XX. Princ.*

might return, should chuse of himself to remain with the Enemy, he shall not afterwards challenge this Right of Postliminy. And Paulus, ⁷ If a Prisoner taken in War, after the making of Peace shall fly Home, and upon the War's breaking out again be retaken, he by this Postliminy returns to him, who in the former War had taken him, unless it be expressed in the Articles of Peace, that the Prisoner should be released.

2. Tryphoninus ⁸ alledges this Reason out of Servius, that the Romans thus behaved themselves to their Prisoners, because they would have them place all their Hopes of returning in their own Valour, rather than in Peace. For as Livy saith, ⁹ Rome in the most antient Times had no Compassion on those that fell into the Enemies Hands. But this Reason being peculiar to the Romans, could not constitute a Rule of the Law of Nations; it might yet be one Motive why they themselves did admit that Custom introduced by other Nations. But this seems to be a better founded Reason, because Kings, and States, who enter into War, desire to have it believed, that their Cause was just in doing it, and theirs unjust who engaged against them: Which whilst both Parties desire to have equally believed, it would not be safe, for others not interested that would live in Peace, ¹⁰ to engage in the Controversy. Therefore the Nations that are at Peace can do nothing better, than quietly ¹¹ to take that to be just, that was done in that War, and so the Prisoners mutually taken in Arms, should be esteemed lawful Captives.

3. But the same cannot be alledged against those who have been unhappily surprized by the sudden breaking out of a War, for no Design

7. PAULUS: *Immo si in bello captas, &c.* Ibid. Leg. XXVIII. See the Observations of Mr. BYNKERSHOEK upon this Law, *Lib. III. Cap. VI.* and the *Jurisprudentia Papinianea* of ANTHONY FAURE, *Tit. XI. Princip. VIII. Illat. XXV. p. 635.*

8. See the Law quoted in *Note 1.* upon this Paragraph.

9. The Passage will be cited below, *Chap. XXI. § 24.*

10. Not only that: They have renounced the Right of examining the Justice of the Cause, and have tacitly engaged, by only remaining Neuter, to suppose the Acts of Hostility, and the Acquisitions thereby made to be just on both Sides. See what I have said upon *Chap. IV.* of this Book, § 4. *Note 1.* There is no Occasion for supposing any Thing else.

11. See PRISCUS, *Excerpt. de Legat. XXVIII.* And BEZAR, of the War of the *Genoese* against the *Venetians*, B. II. GROTIUS.

of injuring can be laid to their Charge: Yet it has not been thought unjust to detain them during the War, in order to weaken the Enemies Power; but upon the End of the War, nothing can be offered why they should not be discharged. Therefore it was established by a tacit Consent of Nations, ¹² that such Prisoners, upon the Conclusion of a Peace, <615> should be released, ¹³ as being accounted innocent by both Parties. But that as to other Captives, every one might use the Right which he would be thought to have over them, unless the Articles of Agreement have otherwise provided. Therefore for the same Reason, ¹⁴ neither Slaves, nor Things taken in War, are restored in Peace, unless expressed in the Articles. Because the Conqueror pretends to have a just Title to them,

12. But our Author has said above, *Chap.* VII. § I. that even those, who have fallen in this manner into the Enemy's Hand by pure Misfortune, are however Slaves by Right of War: Because they, who have taken them, are not obliged to enquire whether they are culpable, and it suffices that they are of the Enemy's Party. Besides, young Children cannot be supposed guilty of any Fault, who however, according to our Author, may be made Prisoners and Slaves in the same manner, as if they were at Years of Discretion. So that the Reason alledged, of a pretended Consent of Nations, is far from being solid: And the more, as it does not appear, that after the Conclusion of a Peace, the Parties believed they had less Right, either over the young Children they had taken, or the unfortunate Prisoners in question, and who were not included in the Treaty, than over those who had been taken in Arms. This then is no more than a civil Law of the *Roman* People; by which, in Consideration of the unhappy Fate of such, as were become Slaves to the Enemy, without having exercised, or having it in their Power to exercise, any Act of Hostility, they were granted the Right of *Postliminy*, even after the Peace; whereas it was refused to the others. And if the Masters of these Slaves, after the making of Peace, could not reclaim this kind of Prisoners from the antient Enemy of the State, (for it does not appear, that the Case was the same with neutral States) it was because as the State knew, or might know, the Custom of the *Romans*, it was supposed, for itself and People, to renounce its Right, from the Time it had not stipulated by the Treaty, that such Slaves for the future, as well as others that belonged to it, should be restored. In regard to the latter see what I have said before, *Chap.* VII. of this Book, § 6. *Note* 9.

13. That is to say if they happened to escape, and return into their own Country.

14. *Totilas* declared to *Pelagius* the Deacon who was sent to him from the *Romans*, that he should not mention the restoring the *Sicilian* Slaves, alledging that it was unjust that the *Goths* should deliver their Fellow Soldiers to their old Masters. The Passage is in *Goth.* Lib. III. *Chap.* XVI. *GROTIUS*.

Our Author in the last Words had put the *Romans* for the *Goths*. And the Passage relates to fugitive Slaves to whom the *Goths* had engaged by Oath not to deliver them up to their antient Masters.

which to contradict, were to lay a Foundation for a new War; whence it is plain, that that alledged in *Quintilian* for the *Thebans*, is rather ingenious than true; that Prisoners, if they can escape into their own Country, are to be esteemed free, because what is gotten ¹⁵ by Force, is not to be kept but by the same Force; we have hitherto treated of the Acquisition of the Right of Postliminy in Time of Peace.

4. In Time of War they return by the Right of Postliminy, who ¹⁶ were free before they were taken Prisoners, but Slaves and other Things are said to be recovered.

V. *When a free Man, during the War, may return by this Right of Postliminy.*

V. He that was free, returns so by this Right (of Postliminy), if he returns with this Design, to follow the Fortunes of his own People to whom he returns, as *Tryphoninus* ¹ has it. For a Slave, in order to become free, ought (if I may so speak) to acquire himself, which he cannot do without willing it. But whether he be retaken from the Enemy by force of Arms, or by Craft made his Escape, it is all the same Thing, as *Florentinus* ² observes. And so it is likewise, if he be freely ³ delivered up by the Enemy.

15. *Dicamus imprimis in eo quod, &c.* Institut. Orat. Lib. V. Cap. X. p. 432. Edit. Burman.

16. The Emperor JULIAN, in his Oration against the Followers of the Cynick Philosophy misunderstood, maintains, that to speak philosophically, a Man cannot really be said to be another Man's Slave, from that other's having only given Money to the Seller for his renouncing his Right to him. For adds he, at that Rate Prisoners of War, when redeemed, should also be stiled the Slaves of those who redeem them; whereas the Laws give them their Liberty, the Moment they return into their Country, and they are ransomed, not in order to their being Slaves, but that they may enjoy their Liberty. Orat. VI. p. 195, 196. Edit. Spanheim. GROTIUS.

See below, § 10. Num. 3. where the Law to which the Emperor alludes is spoken of.

V. (1) *Non enim postliminio revertebatur, &c.* Digest. Lib. XLIX. Tit. XV. De Capt. & Postlim. &c. Leg. XII. § 9. See also Leg. V. § 3.

2. See the Law cited above, Chap. VII. of this Book, § 6. Num. 7. Note 8. Our Author alledges here in a little Note the Example of the *Huns*, who took away, and set at Liberty, some Prisoners, whom the *Sclavonians* had taken, as PROCOPIUS relates, *Gothic.* Lib. III. Cap. XIII. The *Huns* are put for the *Herulians*; for that Historian says this of the latter, who having taken up Arms for the *Romans* met a Troop of *Sclavonians* upon their March, who had taken some Prisoners from the *Romans* along the *Danube*.

3. *Quum non redemptum ab hostibus filium, &c.* Cod. Lib. VIII. Tit. LI. De Postliminio reversis, &c. Leg. V.

But what⁴ shall we say of a Prisoner, who having been sold by the Enemy, is arrived amongst his own People, by passing, as it often happens, from Master to Master? This Controversy is discussed by⁵ *Seneca* in the *Olynthian*, whom *Parrhasius* bought. For when a Decree was passed by the *Athenians*, whereby the *Olynthians* were ordered to be free; he makes this Query, whether by it was meant, that they should become free, or adjudged to be free;⁶ of which the last is the best founded.

VI. I. But one that is free, after he is returned to his own Country, does not only become Master of himself, but also of all Things, that he had in any Nation at Peace, whether corporeal, or incorporeal; because as neutral States had reputed the Fact for a real Right, in regard to the taking of the Prisoner, they ought to do <616> the same in regard to his release; otherwise they would not act in an equal manner towards both Parties; wherefore he that by Right of Arms is possessed of the Body of a Prisoner, has not an absolute but conditional Right to all Things that belong to him, for it may cease against his Will, *viz.* if the Captive should return into his own Country; for so he loses his Right to those Goods of his, as he does to his Person, of which they were an Accessory.

VI. *What Right he may recover, and what not.*

2. What if he had alienated those Goods, shall he who derives his Title from him that was Owner of the Prisoner by Right of War, be secured by the Right of Nations, or else shall those Things (alienated) be recovered? I mean those that are in a neutral Country. And here, in

4. As the Youth *Childubius* in the same Book of *PROCOPIUS*, *He alledged that from the Time he returned into his own Country, he should by Law be free for the future*; and *LEUNCLAVIUS* observes, that formerly there was no Postliminy among the *Turks* for Prisoners. *GROTIUS*.

5. *Ut scias, inquit, servos fuisse, &c.* Lib. V. Controv. XXXIV. p. 390.

6. Because the *Olynthians* were Allies of the *Athenians*, as is said a little before: *Quid enim si Atheniensem a Philippo emissis? Atqui sciebas Olynthios nobis conjunctos esse foedere.* Our Author insinuates therefore, that it was the worse for the People either of the same Country; or of the States in Alliance with them, if they bought any Slave who was free by Right of *Postliminy*; because in buying him, they ought to have supposed, it might possibly happen that the Slave might have that Right, and therefore that they could only acquire him under that tacit Condition, as is said in the following Paragraph, in regard to the Goods of a Prisoner returned, which had been alienated.

my Opinion, we ought to distinguish between those Things that may be recovered by Postliminy, and those not capable of that Right; which Distinction we shall explain below, so that the former seem to be alienated only so far as they could be alienated, that is, conditionally, but the other, ¹ simply and absolutely. By Alienation here, I mean such as includes Donation and ² Acceptilation.

VII. *All Rights in Regard to him are restored.* VII. But as he that returns by Postliminy, recovers the Rights he was possessed of before, so those Rights which one had in Regard to him, are re-established, and deemed to have always subsisted, as if he had never been in the Enemy's Power, as *Tryphoninus* ¹ says.

VIII. *Why they that yield themselves are not capable of the Right of Postliminy.* VIII. *Paulus* ¹ justly makes this Exception to this Rule, as it relates to Freemen, *They have no Benefit of Postliminy, that being conquered by Arms, yield themselves up to their Enemies.* Because all Agreements made with Enemies, by the Law of Nations, are to be punctually observed, as

VI. (i) The Distinction between Things recoverable and not recoverable, by the Right of Postliminy, relates merely to Civil Right, and takes Place only in Regard to the Subjects of the State itself, who would reclaim what has been retaken from the Enemy. See below, § 13. *Note* 3, 4. So that the Difference here put by our Author, in Regard to Things alienated in a neutral State, has no Foundation. The Prisoner of War returned home has an equal Right to recover them all.

2. That is, when a Person discharges another of a Debt, by declaring he has received what was not actually paid. See the *Institutes*, Lib. III. Tit. XXX. § 1.

VII. (i) *Caetera, quae in jure sunt, &c.* Digest. Lib. XLIX. Tit. XV. *De Capt. & Postlim.* Leg. XII. § 6. See also § 15, and Leg. V. So when a Son returned from Captivity, the Rights of paternal Power, suspended in Regard to him, resumed all their Force. *Ipse quoque filius, Neposve si ab hostibus captus fuerit, similiter dicimus, propter jus postliminii, jus quoque potestatis Parentis in suspenso esse.* Institut. Lib. I. Tit. XII. *Quibus modis jus Potestatis Patriae solvitur*, § 5.

VIII. (i) *Postliminio carent, qui armis victi hostibus se dederunt.* Digest. Lib. XLIX. Tit. XV. *De Captiv. & Postlim. &c.* Leg. XVII. This can be looked on only as a particular Law of the Roman People, instituted solely to animate the Citizens to fight to the last Extremity. For as the State had no Part in their Engagement, so was it not held to make it good, and might, if it thought fit, grant them, during the War, the Right of Postliminy, in the same Manner as to those, who, having been made Prisoners by superior Force, and without surrendering, were, however, become the Enemy's Slaves, by either an express or tacit Convention. See what I have said above, *Chap.* VII. of this Book, § 6. *Note* 9.

we shall shew hereafter; neither is Postliminy allowed against them. Therefore those *Romans*, in *Gellius*,² taken by the *Carthaginians*, did own, that *The Right of Postliminy did not belong to them, because they had engaged themselves by Oath*. Whence it is well observed by *Paulus*,³ that during the Time of Truce there is no Postliminy allowed. But *Modestinus*⁴ <617> says, that if they that are delivered up to the Enemy, are engaged by no Covenant,⁵ or Promise, they may return by the Right of Postliminy. <618>

2. *Tum octo ex iis, &c.* Noct. Attic. Lib. VII. Cap. XVIII.

3. *Induciae sunt, quum in breve & in praesens tempus convenit, ne invicem se lacessant: Quo tempore non est postliminium.* Digest. ubi supra, Leg. XIX. § 1. See below, Chap. XXI. § 6. It is plain, that this Decision is a Consequence of the Nature itself of a Truce, which will be treated of below in its Place.

4. *Eos qui ab hostibus capiuntur, vel hostibus deduntur, jure postliminii reverti, antiquitus placuit.* Digest. *ibid.* Leg. IV. Our Author, in his *Florum sparsio ad jus Justinianum*, p. 221. *Edit. Amstel.* says that we must read here, *Ab hostibus deduntur*, and he explains the Words before, *ab hostibus capiuntur*, as *de hostibus*, &c. On that Foot the Sense of the Law would be, that the Prisoners retaken from the Enemy, and those which we recover, by their being restored voluntarily, enjoy the Right of Postliminy. So that then there would be nothing in it relating to the Subject. Our Author, without Doubt, supplies the Particle *ab*, according to the Reading in the vulgar Editions, *Ab hostibus deducuntur*. But the Authority of the *Florence* Edition, with the Example that immediately follows, gives Room to believe that our Author's first Thought was the best. See above, B. II. Chap. XXI. § 4. *Num.* 8. where he explains the Case of this Law himself. However, we must then confess, that in the Beginning of the Law, it treats of Persons restored in a certain Manner: Otherwise there would have been no Difficulty in the Case proposed, if it had been the general and received Maxim of antient Times, (*antiquitus placuit*) that every Person delivered up to the Enemy, returned by Right of Postliminy. See the following Note.

5. That is to say, if they have not engaged to put themselves into the Power of the Enemy, and if the State which delivers them up, has not deprived itself, by a real Agreement, of the Right it had to recover or receive them; in a Word, when it has delivered them simply and purely of its own Accord, or has been reduced to do so by the Superiority of the Enemy's Forces. This is probably what our Author means. For if, according to him, the Engagement of a Prisoner of War, contracted without the Participation of the State, is of sufficient Force to oblige the State to refuse him the Right of Postliminy, the Prisoner much more ought to be excluded from it, when the State itself is bound by its Promise. And if there be no such Engagement, the Action of delivering up does not, of itself, imply any Obligation towards the Enemy, or Intention to deprive the Person delivered up, of the Right of Postliminy. It is the Enemy's Business to keep him, who has been given up into their Hands, or

to lay him under the Restriction of some Promise. See what our Author says above, *B. II. Chap. XXI. § 4. Num. 6.* The Civilian MODESTINUS, whose Words I have recited in the preceding Note, speaks there, in my Opinion, of those whom the State has delivered up purely and simply, being compelled to it by the Misfortune of War; and this may be inferred from his joining them with the Prisoners of War, taken in some Battle, or military Expedition. For it is without Necessity, that FRANCIS BAUDOVIN, (*Jurisprud. Mucian. p. 48.*) and Mr. THOMASIVS, (*Diss. de sponsione Roman. Numantina, § 75.*) after him conjecture, that instead of *Vel hostibus deduntur*, it should be read in a quite contrary Sense, *NEC hostibus deduntur*. The Difficulty arose from another Manner of delivering up, treated of in the End of this Law, which, according to the particular Custom of the *Romans*, excluded those from the Right of Postliminy, who had been delivered up, so that a Rehabilitation was necessary, in Order to their becoming Citizens again, tho' the Enemy had not been willing to receive them. I have spoke of this above, *B. II. Chap. XXI. § 4. N. V. 13, 14, 16.* and the Thing is fully confirmed by what follows. I say then, that in this Part of the Law we are now considering, as well as in the last Law of the Title *De Legationib.* the Question solely relates to Persons delivered up, in Order to discharge the State of some Crime, or shameful Engagement, which, tho' committed or contracted without its Order or Participation, seemed to fly back upon it, principally because the Authors were Persons otherwise invested with its Authority. The *Romans*, either out of Horror for the Crime, or a great Sensibility for the Dishonour, with which they were at least, as much touched to the Quick; judged proper, at the same Time they delivered up such People, not to consider them any longer as Citizens, whether those to whom they delivered them up, received them or not. And this was executed with great Ceremony, by the Chief of the Heralds at Arms, (*Feciales*) who caused the Person delivered up to be stript naked, and bound; as appears by the History itself of *Hostilius Mancinus*, who is there spoken of. See VELLEIUS PATERCULUS, *Lib. II. Cap. I.* DIONYSIUS HALICARNASSENSIS, *Antiq. Rom. Lib. II.* The Form used by the Herald, shews the Aversion the *Romans* professed, both for the Persons delivered up in this Manner, and the Occasion which obliged them to do so, *Quandoquidem hinc homines, injussu populi Romani Quiritium, foedus ictum iri sponderunt, atque ob eam rem noxam nocuerunt; ob eam rem quo Populus Romanus scelere impio sit solutus hosce homines vobis dedo.* LIVY, *Lib. IX. Cap. X. Num. 9.* They apprehended, that without this, the most just Wars might become unjust; as the same *Roman* Historian makes another General of the Army, *Spurius Postumius*, say, on an Occasion of the same Nature with this of *Mancinus*. *Dedamur per Fetiales, nudi vincitque. Exsolvamus religione populum, si qua obligavimus; ne quid divini humanive obstat, quominus justum piumve de integro ineatur bellum.* *Cap. VIII. Num. 6.* *Mancinus*, in Order to be received in the Camp of the *Romans*, after the Refusal of the *Numantines*, to whom he had been delivered up, had Occasion to call in the Aid of Religion; the Augurs being consulted, declared in his Favour, without which he would not have been admitted. *Deditus nec receptus, augurio in castra deductus.* AURELIUS VICTOR. *De Viris Illustr. Cap. LIX.* It is not then to be wondered at, that when the Enemy, or allied State, refused to take those delivered up to them, that Refusal did not hinder their

IX. 1. What we have said of particular Persons, the same may be likewise of Nations, that those that were free, may recover their Freedom, if the ¹ Assistance of their Allies happen to rescue them from the Power of the Enemy. But if the Body of the People that constitute the State, be dis-

IX. *How a People may obtain this Right of Postliminy.*

being considered as deprived of all the Rights of a Citizen, from the Moment the Herald at Arms had pronounced the Sentence for abandoning them. HENNINGES, who has espoused this Opinion, in his Notes upon our Author, (*Lib. II. Cap. XV. § 16. p. 751.*) with Reason alledges in this Place, what *Postumius* says, the Moment the Ceremony was over, that he was become a Citizen of the *Samnites*, who, however, had not then accepted him, nor would receive him afterwards. *Haec dicenti Fetiali, Postumius genu femur, quanta maxima vi, perculit, & clara voce ait, se Samnitum civem esse, &c.* LIVY, *ubi supra*, Cap. X. Num. 10. So that *Mucius* had Reason to compare those unfortunate Persons, to such as were banished the State by a Decree, prohibiting all Persons to give them Fire and Water; and in Consequence, excluding them from the Right of Postliminy, as did the Tribune of the People, who, as CICERO relates, hindered *Mancinus* from entering the Senate. *Quia memoria sic essit proditum, quem—Pater patratus dedisset, ei nullem esse postliminium.* De Orat. *Lib. I. Cap. XL.* If that Orator seems elsewhere to decide in Favour of *Brutus*, (*Topic. Cap. VIII. and Orat. pro Caecin. Cap. XXXIV.*) that only proves, either that he has changed his Mind, as he does sometimes, or that he believed, notwithstanding the Decision of *Mucius*, followed by the Senate, the Case ought to have been adjudged in a different Manner. He says, in one of these Passages, that the Opinion in favour of *Mancinus* might be defended, and not that it may be well demonstrated. The Passage has been cited above, *B. II. Chap. XXI. § 4. Note 13.* So that it is not necessary to have Recourse to the Reconciliations laid down by FRANCIS BAUDOIN, *Jurisprud. Muc. p. 46.* M. THOMASIVS, *Diss. de Spons. Numant. § 67.* and Mr. JENS, *de Fetialib. Pop. Rom. Cap. VI. p. 71, 72.* In a Word, *Mancinus*, and every other Person, who being delivered up, had been refused, was not indeed the Slave of those to whom he was designed to be delivered up, but he did not therefore continue a *Roman* Citizen; he was free, but a Stranger, as ANTHONY FAURE very well observes, *Jurispru. Papin. Tit. XI. Princ. VIII. Illat. I.* All that I have now advanced is founded upon the Genius and Sentiments of the *Roman* People. So that it is of no Use to prove, as Mr. THOMASIVS doth, (*ubi supra, § 14. & seq.*) that the Treaty concluded with the *Numantines*, without the Participation of the *Roman* People, was not really shameful, and that the Fault itself was not to be ascribed to *Mancinus*, but to *Tiberius Gracchus*. It suffices that the *Roman* People believed the contrary, and that they followed the Principles of their Ambition, rather than those of natural Equity, according to which, I confess, they ought to have laid down other Maxims. It is as easy to destroy, by the Reasons here alledged, the Endeavours of the late Mr. COCCEIUS, (*Dissert. De Postlimin. in Pace*) to reconcile here, as well as every where else, the Rules of the *Roman* Law with those of the Law of Nature and Nations, both of which he misunderstands.

IX. (1) See PUFENDORF, *B. VIII. Chap. VI. § 23. Of the Law of Nature and Nations.*

solved, it is more reasonable to say, ² that they are not to be esteemed the ³ same People; nor the Things formerly belonging to that State to be restored to them by the Law of Nations; because a People, like a Ship, by a Dissolution of the Parts, is entirely destroyed, because its whole Nature consists in that perpetual Conjunction. Therefore the City of *Saguntum* was not the same, when it was restored to the antient Inhabitants, eight Years after they had been driven out of it. Nor *Thebes* the same, after the *Thebans* had been sold by *Alexander* for Bondslaves. Hence it is plain, that what the *Thessalians* were indebted in to the *Thebans* before, was not restored to the *Thebans* by the Right of Postliminy, and that for these two Reasons. First, Because they were a new People that demanded this Debt; then, because *Alexander*, whilst he had the Lordship over them, had a Power to alienate that Right, and did really alienate it; besides that a Debt ⁴ is not to be reckoned among Things capable of the Right of Postliminy.

2. What we have said of a State, is not very different from that of the old *Roman Law*, by which Marriages were dissoluble: Marriage was not reputed to be restored by Postliminy, but to be renewed ⁵ by joint Consent of both Parties.

2. See above, *B. II. Chap. IX. § 6.*

3. They may always be considered of the same Nation, but they have no longer that Tie which formed a Body of People, or a State. So that the Objections here raised against our Author, fall to the Ground of themselves.

4. That is to say, the Debts paid to him whom the Person was Prisoner to, or those of which he had discharged the Creditor; for the Case is not the same, with Regard to other Debts.

5. *Non ut pater filium, ita uxorem maritus, jure postliminii, recipit, sed consensu redintegratur matrimonium.* Digest, *Lib. XLIX. Tit. XV. De Captiv. & Postlim.* Leg. XIV. § 1. See also *Leg. VIII.* But it is not the same amongst Christians. Pope LEO says, that if the married Person, who remained in the Country, has married again, during the Captivity of the other, and the other returns, let the Marriage, contracted in the latter's Absence, be annulled. *Ut sicut in mancipiis, vel agris, aut etiam in domibus, ac possessionibus, in captivitate ductis, postliminium reversis de captivitate servatur; ita etiam & conjugia, si aliis juncti fuerint, reformentur.* Epistol. ad Nicet. Aquileiens. Episc. See HINC MAR, *Opusc. de divortio Lotharii & Tethbergae*, ad Interrog. XIII. and the Answer of Pope *Stephen*, Cap. XIX. in the second Tome of the *Gallican Councils.* GROTIUS.

See CUJAS upon the *Novel. XXII.* and in JULIANI *Digest. Lib. LXII. p. 445. Vol. III.*

X. I. By what we have said, one may easily judge what Manner of Right, by the Law of Nations, Postliminy gives to Freemen. But by the Civil Law this very Right, as to what respects those Things that are done within the State, may be restrained by adding some Exceptions, or Conditions, and may be extended to other Profits and Advantages. Thus by the *Roman* Civil Law, ¹ Fugitives are excepted out of the Number of those intitled to this Right of Return, even the Sons of Families, over whom the Father, (one would think) should have retained his paternal Power, as a Privilege peculiar to the *Romans*. But it was thought proper to make this Regulation, because, as *Paulus* ² says, the *Romans* sacrificed their paternal Tenderness to the Observation of military Discipline. Agreeable to which, <619> says *Cicero* of *Manlius*, ³ that he strictly maintained the *Roman* Discipline, to his own personal Sorrow, that he might effectually consult the Safety of the State, in which he esteemed his own included; and that he preferred the Preservation of the General's Authority to the Motions of Nature, and the Affections of a Father.

X. *What Rights have they of the Civil Law, who return by Postliminy.*

X. (1) *Transfugae nullum postliminium est: Num qui malo consilio & proditoris animo, patriam reliquit, hostium numero habendus est.* Digest, Lib. XLIX. Tit. XV. *De Captiv. & Postlim. &c.* Leg. XIX. § 4. Some say here, that our Author has improperly stated this Exception, as peculiar to the *Roman* Laws, and add, that the same Thing took Place amongst all other Nations. That may be. But they alledge neither Example nor Proof. For the Passage of *Livy*, Lib. XXVII. Cap. XVII. Num. 10. which *GRONOVIVS* cites, is not very conclusive, it only proves the Diffidence and Horror they had for Deserters.

2. *Filius quoque familias transfuga non potest liminio reverti, neque vivo patre: Quia pater sic illum amisit, quemadmodum patria, & quia disciplina castrorum antiquior fuit parentibus Romanis, quam caritas liberorum.* Digest. *Ibid.* § 7.

3. That Consul, as is known, caused his own Son to be put to Death, for having given Battle contrary to his Orders, tho' he gained the Victory: And the Orator says, that he confirmed the Law of military Discipline by a Sentence, which he could not pass without plunging himself into the greatest Affliction. *Quod vero securi filium percusserit, privavisse se etiam videtur multis voluptatibus, quum ipsi naturae patrioque amoris praetulerit jus Majestatis atque imperii—Sin ut dolore suo sanciret militaris imperii disciplinam, exercitumque in gravissimo bello animadversionis metu contineret; saluti prospexit civium, quã intelligebat contineri suam.* De Finib. Bon. & Mal. Lib. I. Cap. VII. & X.

2. This also somewhat lessens the Right of Postliminy, which was first enacted by the *Athenian* ⁴ Laws, and after by the ⁵ *Roman*, viz. *That he that was redeemed from the Enemy, should be Slave to him who had paid the Ransom, till he had reimbursed it.* But this seems to have been made in favour of Freedom, lest all Hopes of recovering the Money being lost, many (of the Captives) should be left in the Power of the Enemy. And this very Slavery was much softened by the *Roman* Laws, and by the last Law of *Justinian* ⁶ it was limited to five Years Service. Also, upon the Death of the Ransomed, ⁷ the Right of recovering the Money entirely ceased. Likewise, by any Contract of Marriage between the Redeemer and the Redeemed, ⁸ it was adjudged to be remitted; it was also ⁹ lost by the Prostitution of a Woman ransomed. There were also many other Things enacted by the *Roman* Law, in favour of those that would redeem Captives, and for the Punishment of their Kinsmen that would not redeem them.

4. DEMOSTHENES, *Orat.* in Nicostrat. (p. 724. B. *Edit. Basil.* 1572.) The same Thing is decreed in the Edict of *Charles the Bald*, passed at *Pistes*, Cap. XXXIV. GROTIUS.

5. This Sort of Prisoners, ransomed by a Citizen of the State, continued, as a Kind of Pledge, in his Service who had paid their Ransom, till they had reimbursed him, or he had forgiven them the Debt. *Ab hostibus redempti, &c.* Code, *Lib.* VIII. *Tit.* LI. *De Postliminio reversis, &c.* Leg. II. See the Title of the *Digest.* Leg. XV. Leg. XX. § 2. and CUJAS, *Recit. in Cod.* Vol. IX. *Opp.* p. 1372, 1373. ANTHONY FAURE, *Jurispr. Papin.* *Tit.* III. *Princ.* IV. *Illat.* III. p. 118. JAMES GODEFROY, in *Cod.* THEODOS. *Lib.* V. *Tit.* V.

6. It is in an Ordinance of HONORIUS and THEODOSIUS, adopted by him. *Ne quando enim damni consideratio &c.* Cod. *Lib.* VIII. *Tit.* LI. *De Postliminio reversis & redemptis ab hostibus*, Leg. XX. *seu ult.*

7. *Si patre redempto & ante luitionem defuncto, &c.* *Digest. Lib.* XLIX. *Tit.* XV. *De Capt. & Postlim. &c.* Leg. XV. We see in this Passage of ULPIAN, that he does not absolutely decide, but with a *perhaps*; and that after having said, that the Son may, by paying the Ransom owed by his Father, be considered as his proper Heir. The Civilian even finds a Subtlety in the last Thought, undoubtedly with Regard to the Principles of the *Roman* Law, upon various Matters which relate to the present Case. This the subtil ANTHONY FAURE treats at large in the Place of his *Jurispr. Papin.* p. 119. & seq. cited above, *Note* 5.

8. *Si is, qui te ab hostibus, &c.* Cod. *Lib.* VIII. *Tit.* LI. *De Postliminio reversis, &c.* Leg. XIII. See the *Jurisprudentia Papiniana* of ANTHONY FAURE, *Tit.* XI. *Princ.* VIII. *Illat.* XXII. p. m. 634.

9. *Foedissimae mulieris nequitia permovemur. Quum igitur Filiam tuam, ab hostibus captam, ac prostitutam ab ea, quae eam redemerat, &c.* *Ibid.* Leg. VII.

3. This Right of Postliminy was on the other Hand extended by the Civil Law; in that, not only those Things which are capable of being recovered by the Law of Nations, but also all Goods,¹⁰ and all Rights in general were preserved to a Prisoner that returned, as if he had never been in the Power of the Enemy; this was also the *Athenian* Law: For as we read in *Dion Prusaensis*, fifteenth Oration, A certain Man pretending to be the Son of *Callias*, and that he had been taken Prisoner, in the Defeat at *Acanthus*, and had been a Slave in *Thrace*; when by the Right of Postliminy he returned to *Athens*, demanded the Inheritance of *Callias* from the present Possessors of it; and the only Thing he was obliged to do, was to prove that he was really the Son of *Callias*. The same Author also relates, that the *Messenians*,¹¹ after a long Time of Slavery, recovered both their Liberty and Country. Nay further, when a Prisoner of War was returned,¹² what had been taken from his Goods, either by Prescription, or a¹³ Disengagement of any Obligation of another, by Vertue of which he might have before demanded any Thing, was re-stored to him by a rescissory Action: As well as the Rights that were otherwise deemed extinct by¹⁴ Non-Usage: For in the Edict of entirely restoring Ancestors, he is likewise included, who¹⁵ is in the Power of the Enemy; and this was established by the antient *Roman* Law.

4. The *Cornelian* Law afterwards made Provision for the Heirs of those that died in Captivity with the Enemy, and¹⁶ preserved all their

10. See the Law cited above, § 7. *Note* 1.

11. This Example is not applicable in this Place, but to the Case treated by our Author, in *Paragraph* 9.

12. *Quae vero per usucapionem vel liberationem, &c.* Cod. *ubi supra*, Leg. XVIII.

13. This is called in the *Roman* Law by one Word *Liberatio*. The Reader may see the Interpreters upon the *Digest*. Lib. XLVI. Tit. II. & seqq. but especially the Treatise of the President BARNABY BRISSON, *De Solutionibus & Liberationibus*.

14. As an usufructuary Right, which is lost by Non-Usage for a certain Time.

15. *Si cujus quid de bonis, &c.* *Digest*. Lib. IV. Tit. VI. *Ex quibus caussis majores viginti quinque annis in integrum restituantur*, Leg. I. § 1. After *bonis* should be added *diminutum erit*. See Mr. NOODT, upon this Title, p. 189, 191, 192.

16. *In omnibus partibus juris, is qui reversus non est ab hostibus, &c.* *Digest*. Lib. XLIX. Tit. XV. *De Capt. & Postlim.* &c. Leg. XVII. *Bona eorum, qui in hostium, &c.* *Ibid.* Leg. XXII. Princ. See the *Jurisprudentia Papiniana* of ANTONY FAURE, Tit. XI. *Princip.* IX.

Goods, just as if the Person taken Prisoner died at that very Time. If it were not then for these Civil Laws, the Captive's ^a Goods ¹⁷ would immediately be theirs that seized on them, because he that is taken by the Enemy, ¹⁸ is reputed as not to be at all. But if a Captive did return, he should receive ¹⁹ only those Things which, by the Law of Nations, challenge the Right of Postliminy. But that the Goods of a Prisoner, if he have no Heir, should come to the Publick, ²⁰ was a Law peculiar to the *Romans*. We have hitherto treated of Persons who return from Captivity. I will now speak of such Things as are recovered.

^a See *Lex Wisigoth. l. 5. tit. 4. c. 15.*

17. See above, *B. II. Chap. IX. § 1. Num. 3.*

18. According to the Rule of the Civil Law. *Quod attinet ad jus civile servi pro nullis habentur.* Digest. *Lib. L. Tit. XVII. De diversis Reg. Juris, Leg. XXXII.* And this was conformable to the received Custom; according to which, every Prisoner of War was deemed to be the Enemy's Slave who had taken him. From whence it arose also, that those, of whom no Mention was made in the Treaty of Peace, and who remained Slaves without Resource, were considered as having no longer any Right, and as incapable of transferring any, with Regard to the Things which had belonged to them in the Country. It was to elude this Principle, that the Fiction of the Right of Postliminy and the *Cornelian* Law was invented, in Regard to Prisoners who returned, or died, during the Course of the War. In which, if there was any Thing contrary to the Right, established by Custom, in Relation to Prisoners of War, the Enemy however had no Cause to complain, because it was sufficiently declared, that this Custom would not be observed, and that the Enemy without being opposed, might dispense with following it, by making, on his Side, the same Supposition. Hence the Prisoners were not deemed to be actually engaged to be Slaves, during the Course of the War, in Regard to the Right, which the State had to receive and consider them as free Persons.

19. Our Author in this Place confounds the Effects of the Right of Postliminy in Relation to Strangers, with those it might have in Regard to Citizens of the same State. For it belongs to the Sovereign to dispose of the latter, as he thinks proper, and he has no Occasion to have Recourse for that End to any Fiction. He may therefore extend them further than the Law of Nations, or the Custom of States does, which are not concerned in this Point.

20. *Quod si nemo ex lege Cornelia haeres extiterit, bona publica fient.* Digest. *Lib. XLIX. Tit. XV. De Capt. & Postlim. &c. Leg. XXII. § 1.* See also *Tit. XIV. De jure Fisci, Leg. XXXI.*

XI. 1. Among these are chiefly Slaves of both Sexes, yea ¹ even those that have been often alienated, ² or have been discharged by the Enemy. Because (as *Tryphoninus* ³ well observes) a Release from the Right of an Enemy ought not to prejudice a Citizen of ours, his former Master. But that the former Master may recover his Slave, it is necessary that he either actually possess him, or that he may easily possess him. Wherefore, tho' in other Things it is sufficient, that they be brought just within our Territories, that will not be enough, in Regard to a Slave, unless also the antient Master know his being there. For he that is in the City of *Rome* (as it were) incognito, in *Paulus's* Opinion, is not ⁴ allowed to be yet

XI. How Slaves are recovered by Postliminy, how Fugitives, and those that are redeemed.

XI. (1) But by an Edict of *Theoderick* it was thus ordained, *That Slaves, or Tenants taken by the Enemy, and returning home, be restored to their own Lords, if they were not bought before by some other.* See also CASSIODORE, *Lib. III. Cap. XLIII.* But by the Law of the *Wisigoths*, a Slave recovered by War is restored to his Lord, and the Captor receives the third Part of the just Value. But if he were sold by the Enemy, his Lord was to pay the full Price for which he was sold, together with what had been laid out to render him more capable of Service, *B. V. Tit. IV. XXI.* GROTIUS.

See what I say below, upon § 14. *Note 2.*

2. So the Slaves to whom *Mithridates* had given their Liberty, were restored by *Sylla* to their antient Masters. APPIANUS ALEXANDRINUS, *Bell. Mithrid.* (p. 355. *Edit. Amstel. 2II. H. Steph.*) GROTIUS.

3. *Quia hostium jure manumissio obesse civi nostro servi domino, non potuit.* Digest. *Lib. XLIX. Tit. XV. De. Capt. & Postlim. &c.* Leg. XII. This was because, during the Course of the War, the Acquisition of Things, taken from the Enemy, was not full and entire, no more than the Slavery of Prisoners; on Account of the Hopes People had, and the Right they retained, of recovering what they had lost. See what is said above, *Chap. VII.* of this Book, § 6. *Note 9.*

4. Unless he serves some other Citizen. PAULUS: *Immo quum servus civis nostri, ab hostibus captus inde aufugit, & vel in urbe Roma ita est, ut neque in domini sui potestate sit, neque ulli serviat: nondum postliminio rediisse, existimandum est.* Digest. *ibid.* Leg. XXX. *sive ult.* To consider the Thing in itself, I do not see upon what this Difference is founded; and the rather, because, according to the following Law, the Will of the Slave is not necessary in the Case. ANTHONY FAURE, in his *Jurispr. Papin.* Tit. XI. Princ. VIII. Illat. XXVII. finds an Instance in it of the Spirit of Contradiction, with which the Civilian PAULUS wrote his Notes upon LABEO's *Probable Rules.* He explains the Thought of the former in this Manner. The Slave, says he, in the present Case, tho' returned into the Dominions of the State, can neither of himself enjoy the Right of Postliminy, because he never was a Citizen; nor have that Right in favour of the Person of his former Master, so long as he keeps away from him, and does not put himself again into his Power. If there be not an Exception in this to the general Rule, as Mr. BYNCKERSHOEK (*Observ. III. 6, and 12.*) is for having all these Notes of PAULUS

recovered. And as a Slave, in this Case, differs from Things inanimate, so does he likewise from a Freeman in this, that in Order to recover him by Right of Postliminy, it is not required that he should return, with an Intent to follow the Fortunes of the State. For that is only required of him, that is to recover his own Freedom, not of him that is to be recovered by another. And as *Sabinus* has it, ⁵ *Every Man has a free Power to chuse what State he pleases to make himself a Member of, but not to dispose of the Right of Property which we have over him.*

2. The *Roman Law* did not except fugitive Slaves from this Law of Nations; for even in these the Master may recover his old Right, as *Paulus* ⁶ observes; lest, allowing the contrary, it may be prejudicial, not to him who is still to continue a Slave, but to the Master himself. The Emperors ⁷ (*Dioclesian* and *Maximinian*) say in general, and without Restriction, of Slaves retaken in any military Expedition, what some extend without Reason to all Things retaken from the Enemy, that *They ought to be*

to be considered, which others call Criticisms, and even treat sometimes as Cavils; it is at least a meer Subtlety of the *Roman Law*. The Person of the Slave is not here in Question, but only that of the Master: It is to the Master the Right of Postliminy belongs, the Slave is only the Matter, or passive Subject of it. It is not the Slave that recovers himself, as Persons do who were before free; it is the Master who recovers the Slave. In a Word, the Slave here is to be considered only as Goods recovered by the Right of Postliminy; and, if so, wherefore does it not suffice, that the Slave is in the Country, tho' the Master know nothing of it; as it is allowed, that Things inanimate are deemed to be recovered by their antient Proprietors, the Instant they are within the Country again; whether the Owner of those Things be informed of it or no? Besides, according to the Principles of the *Roman Law*, a Master retains the Possession of his fugitive Slave, as long as he is not in the Service of some other, who possesses him as his own. (*Digest. Lib. XLI. Tit. II. De adquir. vel amitt. Poss. Leg. XIII. Princ. Leg. XV. Leg. I. § 14.*) wherefore then could he not recover this Possession by Right of Postliminy, even tho' the returned Slave conceals himself from him? And the rather, because during the War, the Captivity of the Slave only suspends, in some Measure, the Rights of the Master.

5. *Certe apud hostes manumissus liberatur, &c. Digest. ibid. Leg. XII. § 9.* See the *Jurisprudentia Papiniana* of ANTHONY FAURE, *Tit. XI. Princ. VIII. Illat. XIX. p. 631. & seq.*

6. *Si vero servus transfugerit, &c. Digest. ibid. Leg. XIX. § 5.* See the same ANTHONY FAURE, cited in the preceding Note. *Ibid. Illat. III. p. 613.*

7. *Ab hostibus capti & non commercio redempti, &c. Cod. Lib. VIII. Tit. LI. De Postliminio reversis, &c. Leg. XII.*

deemed recovered, and not taken, and that the Soldier should be their Deliverer, and not their Master.

3. Those Slaves who are ransomed from the Enemy, by the *Roman Law* ⁸ become his that redeemed them, but upon laying down their Ransom, they are deemed recovered by the Right of Postliminy. But it belongs to the Civilians to give a more exact Explication of all this. But some Things have been altered by the modern Laws: And, to invite captive Slaves to return, they propose present Liberty to the disabled, and to the Rest, after five Years; as you may see in the military Laws collected by ⁹ *Rufus*.

XII. That Question more nearly relates to us, whether a People subjected to a foreign Prince return to their antient State, which may be handled, by supposing that it is not their antient Sovereign, but some Ally, who has rescued them from the Enemy; the same, I think, may be answered, ¹ as before, of Slaves, unless it be otherwise agreed by the Treaty of Alliance. <622>

XII. *Whether Subjects may be recovered by Postliminy.*

XIII. 1. Among Things recoverable by Postliminy, the first to be considered are Lands; *It is true* (saith ¹ *Pomponius*) *the Enemy being beaten out of the Lands which they had seized on, the Right of them returns to their former Owners.* But the Enemy must be understood to be driven out, when they cannot come thither any more openly as we have explained

XIII. *That Lands are recovered by Postliminy.*

8. Even tho' he who ransoms them knows to whom they belong. *Si quis servum captum, &c. Digest. Lib. XLIX. Tit. XV. De Capt. & Postlim. &c. Leg. XII. § 7.* Consult ANTHONY FAURE here again, *Jurispr. Papin. Tit. XI. Princ. VIII. Illat. II. p. 622. & seq.*

9. It is in *Num.* 64 of those Laws, the *Latin Version* of which, by JOHN LEUNCLAVIUS, is annexed to VEGETIUS, of *Plantin's* Edition, with the Notes of STEWECCHIUS, printed in 1607. The learned GRONOVIVS refers us in this Place to the Edition of *Simon Schardius*, published at *Basil*, in 1561, which is probably the first.

XII. (1) That is to say, that the People delivered from the Dominion of the Enemy, should return to their lawful Sovereign; upon Condition, that the latter reimburse the Deliverer the Expences he has been at in his Expedition.

XIII. (1) *Verum est, expulsis hostibus, &c. Digest. Lib. XLIX. Tit. XV. De Capt. & Postlim. &c. Leg. XX. § 1.*

elsewhere, (*Ch. iv. of this Book, § 4.*) Thus the *Lacedemonians* restored the Island *Aegina*, recovered from the *Athenians* ² to the antient Lords. So ³ *Justinian*, and other Emperors, restored the Lands recovered from the *Goths* and *Vandals*, to the Heirs of the antient Possessors, ⁴ not admitting those Prescriptions against them, which the *Roman* Laws had introduced.

2. What I have said of Lands takes Place also, in my Opinion, in Regard to all Rights annexed to those Lands. For even Places taken by the Enemy, which had been sacred or religious, when freed from that Misfortune, return as it were by a Kind of Postliminy to their former State, as ⁵ *Pomponius* decides. Whereto agrees that of *Cicero*, in his Oration against *Verres*, concerning *Diana* ⁶ of *Segesta*, *She recovered her Worship and Habitation by the Valour of Publius Africanus*. And *Marcianus* ⁷ compares that Right to the Right of Postliminy, by which, a Place of the Shore being built upon, when the Building is fallen, makes again Part of the Shore. Upon this Principle it must be ⁸ said, that the Profits

2. STRABO, *Geogr. Lib. VIII.* (p. 577. *Edit. Amstel. 376. Paris.*) This was, because they had been of the *Lacedemonian* Party. For the Rest, see what we have said above, *Chap. VI. of this Book, § 7.* GROTIUS.

3. See *Novel. XXXVI. of JUSTINIAN.*

4. And that by a Law of *Honorius*, who, tho' *Spain* were left to the *Vandals*, yet, whilst the *Vandals* possessed it, he would not allow that a Prescription of thirty Years should prejudice the antient Lords, as in *PROCOPIUS, Vandal. I.* The same Exception is found in a *Novel of VALENTINIAN's* with Respect to some Lands in *Africa*, possessed by the *Vandals. Tricennali temporum* &c. *Nov. De episcopali judicio.* The second Council of *Seville* decides, that a Church ought to recover the Parishes it had before the War: And that it cannot be deprived of them by Right of Prescription: Just as by the *Roman* Laws, a Prisoner of War recovers his Possessions, when he returns from Captivity. *GRATIAN, in Caus. XVI. Quaest. III. Can. XIII.* See also the *Decretals, Lib. II. Cap. XXVI.* and *CUJACIUS, on the Title, C. de Praescript 30 Annor. GROTIUS.*

5. *Quod si ab hac calamitate, &c. Digest. Lib. XI. Tit. VII. De Religiosis, &c. Leg. XXXVI.*

6. *Quae [Diana Segestana] Carthaginensium victorià, &c. Lib. IV. Cap. XXXV.*

7. *In tantum ut & soli domini, &c. Digest. Lib. I. Tit. VIII. De divisione rerum, & qualitate, Leg. VI. princ.*

8. This is formally decided by the Civilian *PAULUS*, in the Law which our Author cited in the Margin, where he says the same Thing of a Slave, of whom a Person has the Use without the Property. *Si ager ab hostibus, &c. Digest. Lib. VII. Tit. IV. Quibus modis ususfructus, vel usus, amittitur. Leg. XXVI.*

of the Land recovered are to be restored; like to what *Pomponius* delivers of Lands that had been ⁹ drowned. So it is provided by the Laws of ^a *Spain*, that Counties, and other hereditary Jurisdictions, shall return by Postliminy; the greater absolutely, the less if within the Space of four Years they be claimed after their Recovery, unless it be a Castle, or Fort, lost by War, and recovered again in what Manner soever, the King then hath Right to keep the Possession of it.

^a Reg. Constit.
l. 10. tit. 29.
part. 2.

XIV. 1. Concerning Moveables, the general Rule is directly contrary, that they do not return by Postliminy, but make Part of the Spoil; for *Labeo* ¹ opposes those two Ideas. Therefore, when such Things pass from the Enemy to others by Commerce, wheresoever they are found, they are allowed to be his who bought them; neither has the first Owner ² any

XIV. *What Difference was formerly observed in Relation to Moveables.*

9. *Sed quemadmodum si eodem impetu, &c.* Ibid. Leg. XXIII. See Mr. NOODT's fine Treatise, *De Usufructu*, Lib. II. Cap. XI.

XIV. (1) He says, that whatever is Part of the Booty is not recoverable by the Right of Postliminy. *Si, quod bello captum est, in praeda est, non postliminio redit.* Digest, Lib. XLIX, Tit. XV. *De Captivis & Postlim. &c.* Leg. XXVIII. I have followed Mr. BYNKERSHOEK's Correction of this Law, with a very small Alteration, which seemed necessary: *Si, QUOD, &c.* for *Si, quid, &c.* Observat. Jur. Civ. Lib. III. Cap. VI. For the Rest, this general Rule concerning moveable Things, relates only to civil Right. The same Reasons which authorize the Right of Postliminy, in Regard to Immoveables, take Place in this Case, and with equal Force. Mr. COCCIEUS confesses it, in his Dissertation *De Postliminio in Pace*, Sect. II. § 5. and he says, that if the *Roman* Laws determined otherwise upon it, it was in order to animate the Soldiers to plunder. Another Reason might have been added, of which I shall speak in the following Note.

2. Slaves being of the Number of Effects, and of moveable Effects, it does not appear at first, why they were excepted out of this general Rule, as our Author has shewn above, § II. ZIEGLER says, it was because Slaves might run away from their Masters, and afterwards pretend to have been taken. It is more likely, that it was, because it was easy to know to whom a Slave belonged; whereas, had it been necessary to restore inanimate moveable Things to their first Owners, that would have given Room for much Contest and Difficulty. Besides, those Things not being capable to return of themselves, from the Moment they were taken by the Enemy, the Owner ought to consider them as lost; and the more because it was scarce known into whose Hands they were fallen; whereas a Slave might have the Will, and find the Means to return.

Power to claim them, either amongst ³ <623> a neutral People, or in his own Country. But from this Rule we find of old excepted, Things that were useful in War; which seems to have been generally allowed by all Nations, for this Reason, that the Hope of recovering them might render Men more willing to provide them: For the Laws and Views of most States at that Time, had Respect to warlike Affairs, and therefore they easily agreed in this. We have already mentioned, out of *Gallus Aelius*, ⁴ what Things were esteemed useful in War; but they are more exactly set down, both by *Cicero* ⁵ in his Topicks, and in *Modestinus*, ⁶ viz. Men

3. The Reason why the first Owner could not claim moveable Things, in a neutral Country, is founded on the Nature itself of that Sort of Things. It would be the same with Regard to Immoveables, if it were possible that they could be found on the Lands of a neutral People, taken by Right of War, and afterwards alienated in Favour of some Person of such neutral State. This is a Consequence of the State of Neutrality, which obliging the neutral People to consider, as lawfully acquired, what one of the Enemies has taken from the other, engages also to maintain the Title of those who hold of them any Thing of this Nature, unless it belonged before to a Prisoner of War, who by returning home, and thereby in a Manner recovering himself, has recovered all his Rights, even with Regard to neutral States. See above, § 6.

4. See § 3. *Note 1.*

5. *Postliminio redeunt haec: Homo, navis, mulus clitellarius, equus, equa, quae fraena recipere solet.* Topic. *Cap. VIII.* This Distinction is only in Favor of the Subjects of the State, who had lost things of this Nature that were retaken by People of the same Party. But they can no more be claimed in a neutral Country, than others not excepted.

6. It is MARCELLUS, and not MODESTINUS: *Navibus longis, atque onerariis, &c.* Digest. *Lib. XLIX. Tit. XV. De Capt. & Postlim.* &c. Leg. II. Our Author, in giving us the Abstract of this Law, joins with *Naves Actuariae*, those called *Lusoriae*. And as there were some of the latter, which served to guard the Frontiers of the Empire upon the *Danube*, the *Rhine*, and other Rivers; a *German*, named JOHN JAMES WISSENBAACH, Professor at *Franeker*, in his Life-Time, criticises our Author in this Place, as denying the Right of Postliminy to all those small Vessels comprized under the general Name of *Lusoriae Naves*. But the Critick was not aware, that GROTIUS has distinguished the two Sorts with sufficient Clearness, in describing that of which he intends to speak in this Manner: *Voluptatis causâ paratae*; which extends also to the *Naves Actuariae*, some of which were also of Use in War. See the Note of the learned GRONOVIVS upon this Place, and JAMES GODEFROY, upon the *Theodosian Code*, Lib. VII. Tit. XVII. *De Lusoriis Danubii*, Vol. II. p. 401. & seq. The same WISSENBAACH, in the same Place (that is to say, *Exercit. in Pandectas*, Disp. XXXIX. Num. 23.) suspects also, that our Author has omitted Fishing-Boats or Vessels, in Favour of the *Hollanders*, who have great Numbers of them. But this Suspicion is ridiculous, since

of War and Merchant Ships, but not Gallies and Pleasure-Boats; Mules, but only those used to the Pack-Saddle; Horses and Mares, but only those that will endure the Bit. And these are Things ⁷ which by the *Roman* Law may be validly bequeathed, and may come into the Division ⁸ of an Inheritance.

2. Arms ⁹ also, and Cloaths, are useful in War, but these returned not by Postliminy, because it was an odious Thing, and was even accounted criminal, for a Man to suffer his Arms or Cloaths to be taken from him, as may be every where found in Historians. And in this, Arms are observed to differ from ¹⁰ Horses, because the Horse may possibly break loose without the Fault of the Rider. And this Difference of Moveables seems to have been used in the West, even under the *Goths*, to the Time of *Boetius*. For he expounding the Topicks of *Cicero*, seems to speak of this Right, as if it were in full Force to that Day. <624>

XV. But in these later Times, if not before, this Difference seems to have been taken away. ¹ For those skilled in the Customs of Nations do com-

XV. *What the Law now says of Moveables.*

the Question does not relate to modern Usages. I should rather believe that the Omission proceeded from the Copists or Printers.

7. *Id quod apud hostes est, legari posse*, OCTAVENUS scripsit: & postliminii jure consistere. Digest. Lib. XXX. De Legatis & Fideicommissis I. Leg. IX. See CUJAS upon it, *Recit. in Dig.* 103. T. VII.

8. It is plain that this is upon the Supposition of their being recovered. PAPINIANUS, *De re, quae apud hostes est*, MARCELLUM reprehendit, &c. Digest. Lib. X. Tit. II. *Familiae erciscundae*, Leg. XXII. § 5. and Leg. XXIII. See the great CUJAS here again, *Recit. in Paul.* p. 363. Vol. V. Opp.

9. *Non idem in armis juris est: Quippe nec sine flagitio amittuntur: Arma enim postliminio reverti negatur quod turpiter amittantur. Item vestis.* Digest. Lib. XLIX. Tit. XV. *De Capt. & Postlim.* &c. Leg. II. § 2. and Leg. III.

10. In the Law cited above, *Note 5.*

XV. (1) The late Mr. COCCEIUS, in the Dissertation cited before, *De Postlim. in Pace, & Amnestia*, Sect. II. § 6. & seq. pretends the modern Usage is, on the contrary, that all moveable Things, of whatsoever Nature they be, are recovered by Right of Postliminy. But he alledges only some Examples from the Custom in *Germany*. And therefore the Argument which he founds upon what our Author says concerning Ships, as if it were an Exception to the general Rule, is of no Force, as the Universality of the Custom is not proved. See the different Regulations made in these Provinces, relating to the Recovery of Vessels, in the Commentary of the late Mr. VOET, upon the *Digest*, Tit. *De Captivis & Postliminio*, &c. § 4.

^a Decis. Ge-
nuens. 101. monly declare, that Moveables are not recovered by Postliminy, ^a and we see the same in many Places determined in Relation to Ships.

XVI. *What Things are recovered that want not this Right of Postliminy.* XVI. [[¹]] But those Things (tho' taken by the Enemy) which were not yet brought into Places whereof he is Master, have no Occasion for Postliminy, because they have not yet changed their Owner by the Right of Nations. Also what Pirates and Robbers have taken from us, has no Need of Postliminy, (as ² *Ulpianus* and *Javolenus* ³ relate) because the Law of Nations has not authorised them to appropriate it to themselves, in Prejudice of the antient Owner; on which Account the *Athenians* pretended to receive the Island ⁴ *Halonesus*, which Pirates had taken from them, and *Philip* from the Pirates, as restored, not given, by *Philip*. Therefore, Things taken by them, wheresoever they are found, may be claimed; but, as we have concluded ^a in another Place, so much must be restored to the Person who got Possession upon his own Charge, as the right Owner would willingly have expended for the Recovery of them.

^a B. ii. ch. 10.
§ 9.

XVI. [[Footnote number missing in text.]] (1) See what I have said above, *Chap. VI.* of this Book, § 3. *Note 1.* From whence it appears, that this Rule relates to the Civil Law, and not in the least to the Law of Nations, as our Author would have it, which the late Mr. *TITUS*, (*Observ. in Lauterbach. 1446. Num. 3.*) endeavours in vain to justify, as if he spoke only of what takes Place in Regard to Subjects of the same State, between whom there can scarce happen any Dispute about it, so long as the Things retaken from the Enemy are not in a Place of Safety. Consult again here the Commentary of Mr. *VOET* upon the *Digest. Tit. De Captivis & Postlimin. &c. § 3.*

2. See the Law cited above, *Chap. III.* of this Book, § 1. *Note. 3. A Piratis, aut Latronibus, capti, liberi permanent*, says *PAULUS*, another Civilian, in the same Title, *Leg. XIX. § 2.*

3. He speaks of a Slave, who having been carried off by Robbers, had passed by Traffick from Hand to Hand to the *Germans*, that is to say, to the Enemies of the *Roman* People, and afterwards had been taken from them, in a Defeat, and then sold. Notwithstanding all this, the Presumption would not run in Favour of the Buyer, according to this Lawyer, who follows the Opinion of three others upon this Point. *Latrones tibi servum eripuerant, &c. Digest. Lib. XLIV. Tit. XV. De Captiv. & Postlim. &c. Leg. XXVII.* *DENNIS GODEFROY* opposes this with the sixth Law of the same Title, wherein, however, there is nothing contrary to it. See the *Jurisprud. Papinian.* of *ANTHONY FAURE, Tit. XI. Princ. VIII. Illat. VI. p. m. 615, 616.*

4. *DEMOSTHENES, (aut alius sub ejus nomine) Orat. De Haloneso, p. 30.* See the Letter of *Philip* himself, *p. 63. A. B.*

XVII. But it may be otherwise determined by the Civil Law. As ¹ by the Laws of *Spain*, Ships taken from Pirates, become theirs who take them from the Pirates. For it is not unjust that a private Thing should yield ² to a publick Advantage, especially when the Recovery may prove so difficult. But this Law cannot hinder Foreigners from challenging their own.

XVII. *That the Civil Law changes some Things, as to their own Subjects.*

XVIII. I. That is more admirable, which the *Roman* Laws do testify, *viz.* That this Right of Postliminy took Place, not only between Enemies, but even between *Romans* and all foreign Nations. But this (as I said ^a before) was the Reliques of that barbarous Age of the *Nomades*, wherein the Sentiments of that natural Society that is between all Men were stilled by wicked Customs. Therefore, among Nations which were not actually engaged in a publick War with one another, there was a Kind of War between private Men, authorised and, as it were, declared by Custom; and that such a Licence might not produce many Murders, they agreed to settle Laws of Captivity, which, consequently, introduced that of Postliminy, yet otherwise than with Robbers and Pirates, because those private Hostilities terminated in Conventions, accompanied with a Sort of Equity, which Robbers and Pirates usually despise. <625>

XVIII. *How Postliminy was observed among those that were not Enemies.*

^a See B. ii. ch. 15. § 5.

2. It seems of old to have been very much disputed, whether any of a confederate Nation, being our Slaves, if they should escape home, might be esteemed to return by Postliminy. For so ¹ *Cicero* propounds this Question, in his first Book *De Oratore*. And *Gallus Aelius* ² thus gives us his Opinion, *We observe the same Right of Postliminy, with a free People, with Allies, and with Kings*, as with Enemies. On the contrary

XVII. (1) The same is among the *Venetians*, as appears from the Letters of FRAXINIUS CANAEUS, *Tom. I.*

2. The End of such a Law is to animate Soldiers and Privateers to pursue Robbers and Pirates, from the Hopes of possessing Things taken even from the Subjects of the State. GROENEWEGEN, in his Treatise *De legibus abrogatis & inusitatis*, &c. (in L. 24. and 27. D. *De Captiv. & Postlim.*) says, this is practised in *Holland* and the neighbouring Countries.

XVIII. (1) *Similique in genere, &c.* De Orator. Lib. I. Cap. XI.

2. *Cum populis liberis, &c.* Apud FESTUM, voce *Postliminium*.

Proculus,³ I doubt not, but that Allies, and a free People are as Strangers to us, there is no Postliminy between us and them.

3. In my Opinion we ought to distinguish between Treaties, that if any were made merely with design to put an End to, or to prevent open War, they could not for the Time to come prevent the taking of Prisoners, or the Right of Postliminy. But if any expressed, that they might on both Sides travel in Safety, from one State to another, upon the publick Faith, then the taking of Prisoners ceasing between these two Nations, the Right of Postliminy ceased also. And *Pomponius*⁴ seems to

3. *Non dubito quin foederati & liberi nobis externi sint: Non inter nos atque eos postliminium esse.* Digest, Lib. XLIX. De Capt. & Postlim. &c. Leg. VII. Princ. So the Florence Manuscript has it. The vulgar Editions add a Negative here: *Nobis externi non sint.* And ANTHONY FAURE defends this reading in his *Jurisprud.* (Tit. XI. Princ. VIII. Illat. VII. p. 616, 617.) but by giving the Word Strangers (*Externi*) an improper Signification, which he does not justify by any Example. The learned SALMASIUS on the contrary, whose Opinion GRONOVIVS approves was willing to reconcile the Readings, by striking out both the Negatives, and saying: *Quum foederati & liberi nobis externi sint, inter nos atque eos, &c.* But this is not to be defended, and directly contradicts the Words that follow, where the Civilian shews, that there is no Occasion for the Right of *Postliminy* between the *Romans* and those Allies or free People, because by Virtue of such Relation between them, the Citizens on both Sides retained their Liberty, and the Property of their Effects out of their own Country: *Etenim quod inter nos atque eos postliminii opus est, quum & illi apud nos & libertatem suam, & dominium rerum suarum, aequae atque apud se, retineant, & eadem nobis apud eos contingant?* Tho' the Lawyer might have expressed himself more clearly, his Meaning is evident enough. The Right of *Postliminy* had Place originally, and generally between Stranger and Stranger. The *allied and free People* did not therefore cease to be Strangers; which is the Exception POMPONIVS observes; as CUJAS very well explains him, *Observat.* Lib. XI. Cap. XXIII. This will appear still more, if we call to mind what we have said, B. I. Chap. III. § 21. Note. 25. upon the Condition of the People in question with regard to the *Romans*.

4. *In pace quoque Postliminium datum est: Nam si cum gente aliqua, &c.* Digest. *Ibid.* Leg. V. § 2. The illustrious Mr. BYNKERSHOEK, in his Dissertation, *De dominio Maris*, (Cap. I. p. 5) asserts, that what is said in this Place of a free Person, who becomes a Slave, by having been taken by the Subjects of any of the foreign Nations in question; ought to be understood only of those, who have been made Prisoners for some lawful Cause. But the Words of the antient Lawyer are too clear to admit that Restriction. The late Mr. COCCEIUS, (Diss. *de Postlim. in Pace*, Sect. II. § 29.) gives another the most forced Construction, to the whole Law: He is for having it relate only to People with whom War was made, and when a Clause of general Amnesty has not been inserted in the Treaty of Peace. But this was necessary to reconcile

hint as much, when he says, *If there be a Nation, with whom we have neither Friendship nor Hospitality, nor Alliance on account of Friendship, they indeed are not Enemies. But whatever of ours happens to come to them, is theirs. And a free Man of ours taken by them, becomes their Slave; and so from them to us; therefore in this Case also Postliminy is allowed.* When he said an Alliance on the account of Friendship, he plainly shews that other Alliances may be made, in which may be neither Tie of Friendship nor Right of Hospitality. And *Proculus* fully declares, that he takes those to be People confederated, who have reciprocally promised Friendship, and safe Hospitality, ⁵ when he adds, *For what need is there of any Postliminy between us? When they also may retain even their own Liberty, and Property of their own Things with us, as freely as among themselves, and so we among them.* Therefore that which follows in *Gallus Aelius*, *There is no Postliminy with those Nations, that are under our Government, as Cujacius* ⁶ rightly reads it, must be supplied with this Addition, *nor with those, with whom we have made an Alliance on account of Friendship.*

XIX. 1. But in our Days, not only among Christians, but even most of the *Mahometans*, as this Right of Captivity out of Time of War, so also that of Post-<626>liminy is abolished, the Necessity of both ceasing because the Rights of that natural Relation, which is between all Mankind, have been re-established.

XIX. *When this Right may now be in force.*

2. Yet that antient Right of Nations may still be in Force, if we should have to do with a State so barbarous, as to think it lawful without any manner of Reason, or Denunciation of War, to treat in a hostile Manner the Persons and Goods of all Strangers. And even while I am writing this, it is adjudged in the great Chamber of the Parliament of *Paris* (*Ni-*

the *Roman Law* with the imaginary System of that Author, of a Right of War subsisting after a Peace between antient Enemies; of which we may speak elsewhere, upon *Chap. XX. § 15.* of this last Book.

5. See *Note. 3.*

6. *Quae Nationes in ditione nostra sunt, eum his Postliminium non est:* Instead of: *Quae Nationes in opinione nostra sunt eum his, &c.* as it is in *FESTUS's* Edition. See the Chapter of that great Lawyer's *Observations*, cited in *Note 3.* *FULVIUS URSINUS* had before corrected the Word *opinione* in the same manner.

colaus Verdunius being first President) ¹ that the Goods of the Subjects of *France*, taken by the *Algerines*, a Nest of Pyrates that live upon the Spoil of all Sea-faring People, by the Right of War had changed their Owner, and therefore when retaken by others than the antient Proprietors, became theirs that retook them. In the same Cause was this likewise adjudged, (which I said but now) that Ships are not in these Days reckoned among Things recoverable by Postliminy.

XIX. (1) The late Mr. COCCEIUS in the Dissertation I have just cited, (*Sect. II. § 8.*) finds this Decision impertinent and unjust: Because there is no Right of War in Relation to Pirates. But our Author supposes them not to be considered as Pirates. And if the Custom be such, it may be justified by the Reason alledged above, § 17.
Note I.

*Advice concerning Things done in
an unjust War.*

I. 1. I must now reflect, and take away from those that make War almost all the Rights, which I may seem to have granted them; which yet in Reality I have not. For when I first undertook to explain this Part of the Law of Nations, I then declared, that many Things are said to be of Right and lawful, because they escape Punishment, and partly because Courts of Justice have given them their Authority, tho' they are contrary to the Rules, either of Justice properly so called, or of other Vertues, or at least those, who abstain from such Things, act in a manner more honest and more commendable in the Opinion of good Men.

*I. In what
Sense Honour
and Conscience
may be said to
forbid what
Law permits.*

2. *Seneca* in his *Troas* ¹ makes *Pyrrhus* speak thus,

Lex nulla capto parcit, aut poenam impedit.

*No Law commands to spare the Captive Slave,
Or does forbid to punish him.*

Agamemnon replies,

Quod non vetat Lex, hoc vetat fieri Pudor.

What Law forbids not, Honour doth restrain.

By *Honour* we are here to understand, not so much the Consideration of other Men, and the Care of our own Reputation; as a respect for Equity and Justice, at least a constant Adherence to that which is most

X. [[*sic*: I.]] (1) *Ver.* 333, 334.

just and most honest; so we read in *Justinian's* ² *Institutions*, *Feoffments of Trust so called, because they are secured by no Bond of Law, but only the Honour of the Person entrusted.* So in *Quintilian* ³ the Father, *the Creditor cannot (Salvo pudore) with Honour demand his Debt of the Security, but when he cannot get it from the prime Debtor.* And in this Sense we often see, *Justitia* and *Pudor*, Justice and Honour, joined together.

⁴ *Nondum Justitiam facinus Mortale fugarat,
Ultima de superis illa reliquit humum.
Proque metu populum sine vi pudor ipse regebat. <627>*
*The Crimes of Men were not so mighty grown,
As Justice to expell from mortal View;
She, last of all the Goddesses, retir'd;
And Honour, without Force, then rul'd the World.*

Hesiod. Oper. & Dior. Ver. 192, 193.

—— Δίκη δ' ἐν χερσὶ, καὶ Ἄιδῶς
῾Ουκ ἔσται· βλάβει δ' ὁ κακὸς τὸν ἀρεΐονα φῶτα.
*Honour and Justice both have left the Stage,
All fall a Sacrifice to Vice and Rage.*

Plato in his 12th Book of *Laws*, ⁵ *παρθένος γὰρ αἰδοῦς δίκη λέγεται τε καὶ ὄντως εἶρηται*, or rather *πάρεδρος*. That the Sense may be, *Justice is called the Companion of Honour, and that with Reason.* And in another Place the same *Plato* tells us, ⁶ *θεὸς, &c. God being solicitous for Mankind, lest they should be entirely destroyed, bestowed upon Men Honour and Justice, the Ornaments of States, and the Bonds of Friendship.* ⁷ *Plutarch* in like manner calls *δίκην Justice*, *ἔνοικον αἰδοῦς, the Cohabitant of Honour*; and in another Place he joins *αἰδῶ & δικαιοσύνην, Honour and*

2. *Sciendum itaque est, &c.* *Instit. Lib. II. Tit. XXIII. De Fideicommissariis hereditat. § 1.*

3. *Non enim aliter, &c.* *Declamat. CCLXXIII.*

4. Speaking of the Reign of *Saturn*. *OVID. Fast. Lib. I. Ver. 249. & seqq.*

5. *De Legib. p. 943. E. Vol. II.*

6. *In Protagor. (p. 322. C. Vol. I. Edit. H. Steph.)*

7. *Ad princip. in erudit. (p. 781. Vol. II. Edit. Wech.)*

Justice, together. In *Dionysius Halicarnassensis* ⁸ are named together, αἰδώς, κόσμος, καὶ δίκη, *Honour, Modesty and Justice*. So *Josephus* ⁹ couples together, αἰδω and ἐπιείκειαν, *Honour and Equity*. *Paulus* ¹⁰ the Lawyer unites *natural Right and Honour*. But *Cicero* ¹¹ thus distinguishes between *Justice and Honour*. *Justice* (says he) teaches not to hurt our Neighbour, *Honour* not to offend him.

3. With the Verse before quoted of *Seneca*, agrees that Expression of the same Author in his philosophical Writings. ¹² *How small a Matter is it, to be a good Man, only so far as the Laws require? How much larger is the Rule of Duty than of Right? How many Things does natural Affection, Humanity, Liberality, Justice and Faith demand? Which are all beyond the reach of the civil Laws*. Where one may see he puts a Difference between *Jus*, and *Justitia*, *Right and Justice*. He means by *Right*, that which is

8. *Antiq. Roman.* Lib. VI. (Cap. XXXVI. p. 354. *Edit. Oxon.* 369. *Sylb.*)

9. *Antiq. Jud.* Lib. XIII. Cap. XIX. (p. 456. A.)

10. In speaking of Marriages, wherein *Modesty*, properly so called is intended: The Lawyer says, that it is contrary to the Rules of this natural *Modesty*, and in Consequence to the Law of Nature, to marry one's own Daughter: *In contrabendis matrimoniiis, Naturale jus & Pudor inspiciendus est. Contra pudorem est autem, filiam uxorem ducere*. *Digest, Lib. XXIII. Tit. II. De ritu Nuptiarum, Leg. XIV. § 2.*

11. *Honour*, in general, is not meant here, according to the Idea, which our Author, after the Antients, affixes to the Word *Pudor*, I mean, a constant Adherence to the Rules of Honesty and Virtue. *CICERO* speaks of that Virtue, which consists in the Observation of the Rules of *Decorum*: *JUSTITIAE partes non violare homines, VERECUNDIAE, non offendere. De Offic. Lib. I. Cap. XXVIII.*

12. *Ut hoc ita sit, quam angusta innocentia, &c.* *De Ira, Lib. II. Cap. XXVII.* That Philosopher observes elsewhere, that there are many Things, for which there is no Law nor any Action to be brought, that however the Rules of Commerce in human Society require, which are superior to all written Laws: *Multa legem non habent, nec actionem, ad quae consuetudo vitae humanae, lege omni valentior dat aditum.* *De Benefic. Lib. V. Cap. XXI.* *CICERO* maintains, that the Laws redress Wrongs, in a different manner from that in which the Philosophers correct them. The Laws confine themselves to what is more gross and palpable; the Philosophers cut off every Thing, as far as the Light of an attentive and penetrating Reason extends: *Sed aliter Leges aliter philosophi tollunt astutias: Leges quatenus manu tenere possunt: Philosophi, quatenus ratione & intelligentia.* *De Offic. Lib. III. Cap. XVII.* See a Passage in *QUINTILIAN, Instit. Orat. Lib. III. Cap. VI.* which has been cited above in the fourth Chapter of this Book, § 2. *Num. 2. GROTIUS.*

The Reader may see my two Discourses, *De Permissione & Beneficio Legum*, upon this Subject.

actionable in Courts of Judicature. The same *Seneca* excellently explains this in another Place, by the Example of a Master's Right over his Slaves. ¹³ *As to our bond Servants we must consider, not what we may without Danger of the Law put upon them, but what the Nature of Equity and Honesty would allow, which obliges us to be merciful to our Prisoners, and those purchased with our own Money. Further, Indeed every Thing is lawful with regard to a Slave, <628> considered as such: But there are some Things which are not lawful with regard to a Slave, considered as a Man, according to the common Right of Animals.* In which Place we may observe the double Meaning of the Word *lawful*, the one being taken for that which is really lawful in itself, the other for that which is only lawful externally.

II. *This applied to what is allowed by the Law of Nations.*

II. I. To the same Intent is the Distinction of *Marcellus* in the Roman Senate, ¹ *Not what I have done is here to be debated, since the Right of War justifies whatsoever I have done against the Enemies, but what they ought to have suffered, viz. in Reason and Equity.* Aristotle disputing the Point, whether Slavery arising from War may be esteemed just, hints at this Distinction. ² *Some having in View a Sort of Right, that is, the Law which*

13. *Et in mancipio cogitandum, &c.* Lib. I. *De Clementia*, Cap. XVIII. We might believe from what the Philosopher calls in the End of this Passage, *commune jus animantium*, that according to the *Stoicks*, there was a Right really and properly common to Men and Beasts. But see what I have said upon PUFENDORF, *Law of Nature and Nations*, B. II. Chap. III. § 2. Note 2. and § 3. Note 10. of the second Edition.

II. (1) *Sed non, quid ego fecerim in disquisitionem venit, quem, quidquid in hostibus feci, jus belli defendit, sed quid isti parti debuerint.* LIVY, Lib. XXVI. Cap. XXXI. Num. 2. So our Author cites this Passage. But the Words *quem, quidquid in hostibus feci, jus belli defendit*, which he cites also above, Chap. IV. of this Book, § 5. Note 3. are not in the Manuscript, and GRONOVIVS had Reason for omitting them in his Edition, which has only, *in disquisitionem venit, quam quid isti.* See that learned Critick's Note. He might have observed, that this Gloss crept in probably from the following Words, which are a little lower in the Text, and which I have substituted in the Note referred to: *Quae autem singulis victor aut ademi, aut dedi, quum belli jure, tum ex cuiusque merito, scio me fecisse.*

2. *Politic.* Lib. I. Cap. VI. p. 302. A. Vol. II. *Edit. Paris.* See GIPHANIUS's Commentary upon it.

is certainly³ something just, maintain that Captivity in War is just, but they do not say it is absolutely just, because it may so happen that the War may proceed from an unjust Cause. Agreeable to this is that of *Thucydides*⁴ in the Oration of the *Thebans*, For those ye killed in Fight, it is not so much a Grievance to us, what they suffered was by a Kind of Right.

2. So also the *Roman* Lawyers themselves, what they often call the⁵ Right of Captivity, in another Place call an Injury, and oppose it to natural Equity; and *Seneca*⁶ says the Name of a Slave arose from Injustice, having a respect to what often happens. The *Italians* also in *Livy*,⁷ retaining what they had taken from the *Syracusians* in War, are called obstinate in keeping what they had unjustly gotten. *Dion Prusaensis* having declared, that when Prisoners return Home, they recover their Liberty, adds this,⁸ ὡς ἀδίκως δουλεύοντας, As being unjustly enslaved.

3.⁹ *Lactantius* speaking of the Philosophers says, When they dispute of Duties relating to military Affairs, they reason not according to the Principles of Justice and true Vertue, but adapt their Precepts to the common

3. *SENECA* says, that some acquire a Right to Lands belonging to other People by Arms: *Alii armis sibi jus in aliena terra fecerunt*. *Consolat. ad. Helviam Cap. VI. Right*, and the Acquisition of another's Effects, continuing such, seem incompatible. But they are reconcileable by the Principles we have here laid down in the Text. Add what we have said in *Chap. IV.* of this Book, § 2. *GROTIUS*.

4. *Lib. III. Cap. LXVI.* Edit. Oxon.

5. See the Law cited above, *Chap. VII.* of this Book, § 6. *Note 10.* with the Reflection which I have made there.

6. He says, that as the Title of *Knight* arose from Ambition, the Names of *freed Man* and *Slave* derived their Origin from *Injury and Injustice: Quid est Eques Romanus, aut Libertinus, aut Servus? Nomina ex ambitione, aut ex injuria nata.* *Epist. XXXI.*

7. On the contrary it was the *Greeks*, who were for keeping what they had taken, during the War, from the antient Inhabitants of *Italy: Graeci res a quibusdam Italici generis, &c.* *Lib. XXIX. Cap. I. Num. 16, 17.*

8. *Orat. XV.*

9. *Itaque quum de Officiis, &c.* *Instit. Divin. Lib. VI. Cap. VI. Num. 24.* *St. AUSTIN* says, that if Men duly observed the Precepts of the Gospel, War itself would not be made without Charity and Benevolence: *Ac per hoc si terrena, &c.* *Epist. IV. Ad Marcellin.* He observes elsewhere, that Wars themselves are peaceable among the sincere Adorers of the true GOD: *apud veros DEI cultores, etiam ipsa bella pacata sunt.* *De diversis Ecclesiae Observationibus. GROTIUS.*

The last Passage is cited in the Canon Law, *Caus. XXIII. Qu. I. C. I.*

Practice and Customs of civil Life. He says afterwards, that the *Romans*¹⁰ acted unjustly by Law.

III. *What is done in an unjust War is unjust in itself.*

III. We then first declare, if the Cause of the War be unjust, tho' it be undertaken in a solemn Manner, yet all the Acts of Hostility done in it are unjust in themselves. So that they who knowingly do these Acts, or join in the acting of them, Are to be accounted in the Number of those, who without Repentance cannot enter into the Kingdom of *Heaven*, 1 Cor. vi. 10. But true Repentance, if Opportunity and Ability will allow, absolutely requires¹ that he who has done any Damage, either by killing, ravaging or plundering, should make full Restitution. Therefore GOD himself declares their² Fasts to be unacceptable to him, who detained their Captives unjustly taken. And the King of *Nineve*, (*Jonah* iii. 8.) proclaiming a Fast to his Subjects, commands them all to restore what they had taken by Rapine; acknowledging, by the Guide of natural Reason, that all Repentance without such a Restitution would be but pretended, and to no Purpose. And not only the³ *Jews* and Christians are of this Opinion, but even the^a *Mahometans* themselves.

^a See Leunclavius, *Turc.* v. and 17.

IV. *Who are hereby obliged to make Restitution, and how far.*

IV. But the Authors of War, whether by their Authority, or Counsel, are obliged to make this Restitution, according to what we have declared in general^a elsewhere, for all those Damages which are the usual Consequences of War; and for what are unusual, if they either contributed to them by Command or Advice, or not prevented them, if it was in their

^a B. 2. c. 17.

10. These Words have been cited above, *Chap.* IV. of this Book, § 5. *in fn.*

III. (1) See NUMBERS v. 6, 7. St. JEROME says, that if all we have unjustly taken be not restored, we cannot avoid the Sentence of Condemnation: *Nec differtur ultionis sententia, si non reddantur universa.* Ad Rusticum. St. AUSTIN maintains, that if another's Goods are not restored, for which we have sinned, when it is in our Power to restore them our Repentance is not real, but feigned. *Ad Macedon.* Epist. LIV. The latter Passage is cited in the CANON LAW, *Caus.* XIV. *Quaest.* VI. *Can.* I. GROTIUS.

I do not find the Words of St. JEROME in the Place referred to.

2. It is in the fine Passage of ISALAH, *Chap.* LVIII. *Ver.* 5, 6, 7. that JUSTIN Martyr, repeats in *Greek* in his Dialogue with *Tryphon.* (p. 47. Edit. Oxon.) GROTIUS.

3. MICOTZI, *Lib. Praeceptorum Legis*, Praecept. jub. XVI. See also the *Penitential Canons* of MAIMONIDES, *Cap.* II. § 2. GROTIUS.

Power to have done it. Thus are Generals and Officers also obliged to do, in Relation to those Things which have been committed by those under their Command. The Soldiers, who have concurred in an Act of Hostility committed in common, as the burning of a Town, are each responsible for ¹ the whole Damage. But if the Damage has been caused by the distinct Acts of several, each shall be answerable for the Mischief, of which he has been the sole or partial Cause.

V. I. Neither can I allow the Exception, which some make of those that serve under others, that they are only responsible for the Damage, when there is on their Part ¹ some Fault accompanied with Fraud. For the bare Fault, without bad Intention, is sufficient to engage to a Restitution.

V. *Whether Things taken in an unjust War, are to be restored by the Captor.*

IV. (1) It is decided in a Law, which our Author cites in the Margin, that if two or more Men have stolen a Beam, which one of them alone could not carry off, each of them is entirely responsible for the Theft: *Si duo pluresve unum, &c.* Digest, *Lib. XLVII. Tit. II. De Furtis, Leg. XXI. § 9.* We must further observe here, that it is generally impossible for a Soldier to make amends for the Damage, to which he has concurred in common, and for which he is thus wholly responsible. The Instance of burning a City suffices to explain this. And as to what a Soldier has done, where the Proportion of the Damage he has caused, may be distinguished, as when he has been concerned with others in plundering a City; he cannot commonly know to whom what he has taken belonged, nor in Consequence to whom he ought to restore it. In the first Case the absolute Impossibility of Amends must acquit him, with regard to those who have suffered the Damage. In the latter, the Obligation of making Restitution is suspended, till the Soldier has discovered the right Owner of the Booty he has taken. But in either Case, a Person that has the least Tenderness of Conscience, will be extremely mortified for the Impossibility either absolute or present under which he finds himself; since when People have the Means in their own Hands of making Amends for a Wrong done, it is a great Consolation, and a Discharge, which obliterates in some Sort the Crime. After all, as the Powers, who undertake an unjust War, are always more culpable than those who serve under them in such Wars, they can also generally make Amends, either wholly or in Part, for the Evils of which they have been the first Cause; and by discharging their Duty in that manner, exempt the Soldiers from the Obligation they are under of making Restitution, which they very seldom believe they are bound to do.

V. (1) In all the Editions it is in this Place: *Si modo in ipsis aliquid haereat culpae.* But our Author's Answer to this Proposition shews, that there must be some Fault in it. I therefore translate it, as if it had been writ: *Aliquid haereat DOLOSÆ culpae.* The Sense necessarily requires something of this Kind, and I might perhaps assure myself, that I have guessed the Word, if I had SYLVESTER, to whom our Author refers in the Margin, (*Part I. Num. 10*) and whom he refutes.

There are some who seem to think, that Things taken in a War, tho' its Cause were really unjust, are not to be returned; because both Sides, when they engaged in the War, were supposed to have granted them to the Captors. But it cannot be easily presumed, that any Man will rashly part with his Right, and War in itself is far different from the Nature of Contracts. But that neutral Nations might know what to do, and might not be forced into a War against their Wills, it was judged sufficient to introduce this external Right of Property, (which we have mentioned before) which may be agreeable with the internal Obligation to Restitution. And indeed those very Authors seem to allow as much concerning the Right over Prisoners of War. Wherefore the *Samnites* in *Livy* ² say, *We have restored the plundered Goods of our Enemies, which by the Law of Arms seemed to be ours; seemed only, he saith, because that War was unjust, as the Samnites had before acknowledged.* <630>

2. Not much unlike this, a certain Power arises from the Law ³ of Nations in a Contract made without Fraud, wherein there is an Inequality, to force the Contracter to perform his Contract; Nevertheless he that stipulates more than his Due, is obliged in Honesty and Conscience to reduce it to a fair and just Equality.

VI. *Whether by him also that detains.*

^a See B. 2. ch. 10.

VI. 1. But further, tho' a Man has not done the Damage himself, or if he did it without any Fault of his, ^a but yet keeps in his Possession ¹ a Thing taken away by another in an unjust War, he is obliged to restore it; because there can be no Reason produced naturally just, why the other should be deprived of it. There is neither a Consent on his Part, nor an Occasion of Punishment, nor a Compensation to make. Not unlike to this is that of *Valerius Maximus*. ² *The People of Rome, saith he, when*

2. *Res hostium in praeda captas, quae belli jure nostrae videbantur, remisimus*, Lib. IX. Cap. I. Num. V.

3. See above, B. II. *Chap.* XII. § 26. or last.

VI. (1) This must be explained according to the Principles referred to in my Notes upon the Chapter cited in the Margin.

2. *Idem* [Populus Romanus] *quum, &c.* Lib. VI. Cap. V. Num. I. *Mark Anthony* caused the *Tyrians* to return what belonged to the *Jews*. He ordered, that the Prisoners, who had been sold should be set at Liberty, and the Effects taken from the

P. Claudius *publickly sold some Camerine Prisoners taken in the War, when he was General, tho' they found their Treasury filled with the Money, and the Borders of the Empire enlarged, yet because they were not fully convinced of the Justice of that Expedition, they with utmost Diligence having sought out the Prisoners, redeemed them, and restored them their Lands.* Thus by the Decree of the *Romans*, even their publick Liberty was restored to the ³ *Phocians*, and also their Lands, which had been taken from them: And afterwards the ⁴ *Ligurians*, who had been sold by *M. Pompilius*, (their Ransom being paid to the Purchasers) were restored to their Liberty, and their Goods carefully returned. The Senate ⁵ decreed the same in favour of the *Abderites*, adding this Reason for it, because the War made upon them was unjust.

2. Yet may the present Possessor, whatsoever Charge or Pains he has been at, lawfully deduct as much, as the Proprietor would willingly have expended to have recovered his endangered Possession, according to the Principles we have before laid down. But if the Possessor of it, without any Fault of his, has either wasted or alienated it, he shall not be obliged to refund, further than he shall be thought to have been made richer by it.

Jews restored to their Right Owners. JOSEPH. *Antiq. Jud.* Lib. XIV. (Cap. XXII. p. 492. G.) *Macrinus* restored the Prisoners and Booty to the *Parthians*, because the *Romans* had broken the Treaty without Cause. HERODIAN. *Lib.* IV. in fin. Sultan *Mahomet* set the Prisoners at Liberty that had been taken at *Santa Maria* in *Achaia*, CHALCOCONDYLAS, *Lib.* IX. GROTIUS.

3. *Phocaeensibus & ager, quem*, &c. LIVY, *Lib.* XXXVIII. *Cap.* XXXIX. *Num.* 12.

4. *Quas ob res, placere Senatui*, &c. Idem. *Lib.* XLII. *Cap.* VIII. *Num.* 7. See also DIOD. SICUL. *Excerpt. Peiresc.* (p. 298.) GROTIUS.

5. *Iisdem mandatum, ut & Hostilio*, &c. LIVY, *Lib.* XLIII. *Cap.* VI. *Num.* 21.

*Moderation concerning the Right of
killing Men in a just War.*

I. *That some Acts in a just War, are unjust in themselves.*

I. I. But that is not to be allowed in a just War, as is commonly said,

———— ¹*Arma tenenti*
Omnia dat, qui justa negat. ————
He gives up all, who what is just denies.

But *Cicero* has it better, *There are certain Duties to be observed even towards those that have wronged us,* ² *for there is a Moderation required in*

XI. [[*sic*: I.]] (I) LUCAN. *Pharsal.* Lib. I. Ver. 349, 350.
2. *Sunt autem quaedam officia, &c.* De Offic. Lib. I. Cap. XI. See what we have said above, B. II. Chap. XX. § 2. and 22. and the Passages of St. AUSTIN, cited in the preceding Chapter, (§ 2. Num. 3. Note 9.) in regard to the Benevolence *Christians* ought to retain for each other, even in War. ARISTOTLE speaking of a too rigorous Punishment exercised of old at *Thebes* and *Heraclea*, ascribes it to a Spirit of Sedition. *Politic.* Lib. V. Chap. VI. THUCYDIDES ranks amongst the Disorders of *Greece*, of which he gives a lively Description, the revenging of Injuries, beyond the Bounds of Justice and the publick Good, Lib. I. (Cap. LXXXII.) TACITUS says of *Pompey*, that in making too rigorous Laws for the Correction of Vice, the Remedies were worse than the Diseases: *Tum Cn. Pompeius, tertium Consul, corrigendis moribus delectus & gravior remediis, quam delicta erant, &c.* Annal. Lib. III. (Cap. XXVIII. Num. 1.) The same Historian blames *Augustus* a little above, for having forgot, in the Punishment of Adultery, the Clemency of the antient *Romans*, and his own Laws: *Nam culpam inter viros ac foeminas, &c.* (Ibid. Cap. XXIV. Num. 3.) JUVENAL observes that an Husband's Resentment for his Wife's Infidelity hurries him sometimes into more terrible Extremities, than all the Laws have ever admitted in favour of Revenge:

———— *Exigit autem*
Interdum ille dolor plus, quam Lex ulla dolori
Concessit ————

Revenge and Punish-ment. The same Author commends the an-
 tient Times of the ³ *Romans*, when the Ends of their Wars were either
 mild, or rigorous, merely through Necessity. *Seneca* ⁴ calls those cruel,
 who having a just Cause to punish, have no Moderation in it. *Aristides*
 saith, ⁵ *It is possible that they may be unjust, who only revenge a Wrong done*
to themselves, if they go beyond Moderation; for he that in this Act shall
exceed just Bounds, renders himself culpable in his Turn. Thus in *Ovid's*
⁶ Opinion, a certain King,

———— *Caede nocentum*
Se nimis ulciscens extitit ipse nocens.
 Following the Guilty with too quick Revenge,
 Deriv'd a Guilt upon himself. ———

The *Plateans* in an Oration of *Isocrates* demand, ⁷ *If it be just, thus for*
such slight Trespasses to exact rigorous Punishments. And the same *Aristides*
 in his second Oration for Peace, saith, *Consider not only the Reasons for*

Sat. X. Ver. 314, 315. *QUINTILIAN* takes it for granted, that only the most atrocious
 Parricides are punished, when no longer in Being, that is to say, by depriving their
 Bodies of Sepulture: *Ideoque non nisi ab ultimo parricidio exigitur poena trans homi-*
nem. *Declam. VI. (Cap. X. p. 137. Edit. Burn.)* The Emperor *Marcus Antoninus*
 wrote to the Senate so to moderate the Proscription and Punishment of the Accom-
 plices in the Revolt of *Avidius Cassius*, that nothing might be too rigorous nor cruel
 in them: *Et ad Senatum scribam, ne aut proscriptio gravior sit, aut poena crudelior.*
VULCAT. GALLICAN. Vit. Avid. Cass. (Cap. XI.) AUSONIUS intimates, that Punishment
 and Vengeance may exceed the Crime:

———— *Vindictaque major*
Crimine visa suo ———

[*Cupid. Crucifix. Ver. 93, 94.*] *AMMIANUS* condemns such Conduct in regard to a
 conquered Enemy: *Saevitum est in multos acrius, quam errata flagitaverant, vel delicta,*
Lib. XXVI. (Cap. X. p. 514. Edit. Vales. Gron.) There is a like Reflection in *AGATHIAS,*
Lib. III. [or rather Lib. IV. Cap. VI.] GROTIUS.

3. *Verumtamen quamdiu imperium, &c. De Offic. Lib. II. Cap. VIII.*
4. *Illos ergo Crudeles vocabo, &c. De Clement. Lib. II. Cap. IV.*
5. *Orat. Leucric. I. (p. 94. A. Vol. II. Edit. Paul. Steph.)*
6. *De Ponto, Lib. I. Epist. VIII. Ver. 19, 20.*
7. *Orat. Plataic. p. 298. B. Edit. H. Steph.*

punishing, but also the Persons to be punished, who we ourselves are, and what is the just Measure of Punishment. Minos is commended in Propertius:

Victor erat quamvis, aequus in hoste fuit.

Tho' Conqueror, ⁸ to Foes was always just.

And in *Ovid*, ⁹

——— *leges captis justissimus auctor*

Hostibus imposuit ——

Most just to Captives he dispenses Laws.

II. *Who may be killed with a safe Conscience.*

II. 1. But when it is just to kill (for there we must begin) in a just War according to internal Justice, and when not, may be plainly understood from what I have said in the first Chapter of this Book. For a Man may be killed either designedly, or <632> without a direct Design. No Man can be justly killed with Design, unless for a capital Crime, or because we cannot really secure our Lives and Estates without doing it. Tho' that very Thing, to kill a Man on account of our Estates, which are frail and perishable Goods, is not repugnant to Justice strictly taken, yet is it far wide from ¹ the Law of Charity. But that the Punishment may be just, it is absolutely required, that he who is killed should have rendered himself culpable, and that in so heinous a Manner, that before an upright Judge he should be condemned to die. Of which we shall here say the less, because we have fully explained already, in the Chapter concerning Punishments, whatever is necessary to be known on this Head.

8. *Lib.* III. *Eleg.* XVII. *Ver.* 28.

9. (*Metam.* *Lib.* VIII. *Ver.* 101, 102.) The same Poet says elsewhere, that Compassion is laudable even towards an Enemy:

Est etiam miseris pietas, & in hoste probatur.

Trist. *Lib.* I. *Eleg.* VIII. (*Ver.* 35.) GROTIUS.

II. (1) But see what I have observed above, *B.* II. *Chap.* I. § 13. *Note* I.

III. I. Above, ^a when we treated of Suppliants, (for there are such both in Peace and War) we distinguished between the unfortunate and culpable. *Gylippus* in that Place of *Diodorus Siculus*, which I there quoted, asks this Question, ¹ in what Class the *Athenians* ought to be reckoned, either of the unfortunate or the unjust. And he declares, they cannot be ranked among the unfortunate, because voluntarily without any manner of Provocation, they had made War on the *Syracusans*: Whence he infers, since they had freely begun a War, they must expect to undergo the Miseries of that War. They are to be esteemed unfortunate who happen to be in the Party of one of the Enemies, without any hostile Disposition towards the other Party, as the *Athenians* in the Time of *Mithridates*, of whom thus speaks *Velleius Paterculus*, ² *If any one should charge the Athenians with Rebellion, at the Time (when Athens was besieged by Sylla) he is very ignorant both of Truth and antient History. For the Fidelity of the Athenians was so firm to the Romans, that always, and upon all Occasions, whatsoever was done with a singular Honesty, the Romans used proverbially to say, it was done Athenian like. But then being oppressed by the Forces of Mithridates, they were reduced to a most miserable State, whilst they were within enslaved by their Enemies, and besieged by their Friends, whilst their Hearts were without the Walls, but their Bodies in compliance with Necessity, were within.* Which last Part seems to be taken out of *Livy*, ³ in whom *Indibilis* the *Spaniard* declares, that his Body only served the *Carthaginians*, but his Mind the *Romans*.

2. For, saith *Cicero*, ⁴ *all those whose Lives are in the Power of others, often consider what they can or may do, at whose Mercy they lie, rather than what they ought to do.* So says the same *Cicero* ⁵ for *Ligarius*, *It is the third Time that he continued in Africk after the coming of Varus, which if it be a Crime, it is of Necessity not of Will.* And *Julian* took this course in the

III. *No Man can be justly killed for his Misfortunes, as they that are forced to follow a Party.*

^a B. 2. *cb.* 21. § 5.

III. (i) *Lib.* XIII. *Cap.* XXIX. p. 345. Edit. H. Steph.

2. *Si quis hoc rebellandi, &c.* *Lib.* II. *Cap.* XXIII.

3. *Itaque corpus dumtaxat suum, &c.* *Lib.* XXVII. (*Cap.* XVII. Num. 13.)

4. *Propterea quod omnes, &c.* *Orat.* pro P. Quint. [*Cap.* II.]

5. *Tertium est tempus, &c.* *Orat.* pro Qu. Ligario, *Cap.* II.

Case of the *Aquileians*, as *Ammianus* ⁶ testifies, who when he had ordered the Punishment of a few, adds, he let the others Escape, *as whom*
^b *Ad Lib. i.* *Necessity, not Choice, had forced into Arms.* Thus says an antient ^b Com-
^{Cap. 55.} mentator on that Place of *Thucydides*, of the *Corcyrean* Captives that were sold. *It was an Act of Clemency, worthy of the Greeks, for it is inhuman to kill <633> Prisoners after the Battle is over, especially Slaves, who*

6. *Residui omnes abierunt innoxii, &c.* Lib. XXI. Cap. XII. p. 307. The Historian adds immediately after, that this Emperor who was of a mild and merciful Disposition acted in this manner from the Motive of Equity: *Id enim aequitate pensatâ statuerat placabilis Imperator & Clemens.* THUCYDIDES makes *Cleon* the Athenian say that he pardoned those, whom the victorious Arms of the Enemy had compelled to revolt, *Lib. III. (Cap. XXXIX.)* This is what PAULUS the Lawyer [in treating another Subject] calls: *Contemplatio extremæ necessitatis.* Recept. Sentent. *Lib. V. Tit. I. § I.* And certainly nothing is stronger than Necessity, as SYNESIUS said: *Ἰσχυρὸν ἀνάγκη πρᾶγμα, καὶ βίαιον.* JUVENAL, speaking of the *Calaguritani* a People of *Spain*, who were reduced in a Siege to eat human Flesh, maintains, that Men and Gods ought to pardon them upon account of the Extremity to which their City was reduced:

——— *Quis nam hominum veniam dare, quisve Deorum,
 Viribus abnueret dira atque immania passis.*

Sat. XV. 102, 103. See CASSIODORUS upon what Famine is capable of reducing Men to do, *Var. Lib. IX. Cap. XIII.* The Emperor *Pertinax*, to excuse *Laetus* the *Praefectus Praetorio*, and some others, who had been the Instruments in *Commodus*, his Predecessor's Crimes; said, that they had been compelled to obey him; but that since they were at Liberty to speak and act, they had shewn of what Sentiments they had always been: *Nec parendi scis necessitatem, &c.* (CAPITOLIN. in *Pertin. Cap. V.*) *Cassius Clemens* justifies himself to *Severus* thus: "I knew, says he, neither you nor *Piscennius Niger*: But finding myself in the midst of his Party, I did what Necessity obliged me to do: I obeyed him, who was in the actual Possession of the Empire, not with design to make War against you, but to expel *Julian.*" XIPHILIN. in *Sever.* The Emperor *Aurelian* having entered *Antioch*, where many People had joined *Zenobia* against him, published an Edict, by which he granted a general Amnesty to all those who had escaped, regarding all that was past as the Effect of Necessity, rather than a Disposition to revolt. (ZOSIM. *Lib. I. Cap. LI.*) The General *Belisarius* forgave the *Africans*, because they had submitted to the *Vandals* only through Force. PROCOP. *Vandal. Lib. I. (Cap. XX.)* TOTILAS, as the same Historian relates, tells the *Neapolitans* that he knew they were under the *Romans* only out of Necessity. *Gothic. Lib. III. (Cap. VII.)* NICETAS, or the Person who continues his Work, informs us, that the Emperor *Henry*, the Brother of *Baldwin*, caused the Inhabitants of a certain City to be put to the Sword, like an Herd of Beasts, and not a Multitude of *Christians*; and with so much the greater Cruelty, adds he, because they had submitted to the *Blachi* thro' Force, and not Persuasion. GROTIUS.

do not fight of their own Choice. The Plataeans thus argue in the aforesaid Oration of Isocrates, ⁷ *We did not serve them willingly (the Lacedaemonians) but were forced to it.* And so for the other Grecians, *They were forced with their Bodies to join with them, but their Hearts were with you.* Herodotus ⁸ also says of the Phocians, *They followed the Medes not voluntarily, but forced by Necessity.* Alexander spared the Zeldi, as Amianus relates, ⁹ *Because they were forced into the Service of the Barbarians.* Diodorus ¹⁰ makes Nicolaus the Syracusan thus plead for the Captives, *The Allies were forced to make War; wherefore as it is but just that they should be punished, who designedly offer the Wrong; so it is equally just to pardon them, who offend against their Will.* So in Livy, ¹¹ the Syracusans to excuse themselves to the Romans, said, *they broke the Peace being oppressed by Fear and Fraud.* Thus for a like Reason Antigonus declared, ¹² *That he made War with Cleomenes, and not with the Spartans.*

IV. I. But it is to be observed, that between an absolute Injury, and a mere Misfortune, there often intervenes something of a middle Nature, as it were composed of both, so that the Action cannot be said to be either entirely of Knowledge and voluntarily, nor purely of Ignorance and against the Will.

IV. *Nor for a middle Fault between Misfortune and Fraud, whose Nature is explained.*

2. Aristotle calls this Act ἀμάρτημα, in Latin rendered *culpa*, a Fault. For thus he says in the 5th Book of his Morals, and the 10th Chapter. *Of voluntary Actions, some we do deliberately, others not. They are said to be done deliberately, which are acted by a certain previous Consultation of the Mind; what are otherwise, we say are done unadvisedly. Since then in human Society an Injury may be done three Ways, that which proceeds from Ignorance is termed a simple Fault. As, if a Man should do a Mischief to one whom he did not design to hurt, or what he did not really intend, or not in the manner he intended it, or not with such a View; as if any one did*

7. P. 299. A. Edit. H. Steph.

8. Lib. IX. Cap. XVII.

9. ARRIAN. *De Exp. Alexandr.* Lib. I. Cap. XVIII. Edit. Gronov.

10. Lib. XIII. Cap. XXVII. p. 344. Edit. H. Steph.

11. *Nec postea pacem Tyranni, &c.* Lib. XXV. Cap. XXIX. Num. 3.

12. *Veniamque his, qui superfuerunt, &c.* Lib. XXVIII. Cap. IV. Num. 13.

not think to strike with this Instrument, not this Man, or not upon this account; but it happened otherwise than he proposed to himself: He designed to pinch, not to wound, either not this Person, or not in this manner. Therefore if a Damage happen thus against all Expectation, it is a Mischance; but if it might in some manner have been expected or foreseen, tho' not with an evil intent, it is a simple Fault: For there is some Fault on the Part of the Agent, when the Principle of Action is within him: But when the Principle of Action is without him, he is only unfortunate; but when a Man does knowingly what he does, though not deliberately, it must be acknowledged that an Injury is done: As whatsoever Men may do through Anger, or other like Disturbances of the Mind, either natural, or inevitable; for they who in Passion do Mischief, and yet through their Fault, do certainly commit an Injury, neither yet are they reckoned unjust or malicious. But if a Man should do it deliberately, he is rightly accounted wicked and unjust.

3. *Therefore whatsoever is done through Anger, is judged with Reason not to be done premeditatedly; for he does not begin, who in a Passion does an Injury, but he that provoked that Passion. Hence it is, that when such Cases are tried at Law, the Question frequently turns, not upon the Fact, but upon the Right; for Anger arises from hence, that a Man thinks himself wronged. Therefore the Query is not here, as in Contracts, whether what is complained of be done, or not; for there, unless there be Forgetfulness, one of the Parties must of Necessity be wicked in not performing the Contract, but in this they demand, whether what was done were justly done. Now he that first laid an Ambush, did it not through Ignorance, wherefore no wonder if the one Person <634> thinks himself wronged, and the other not. But even those who commit Injuries without Deliberation, and in Passion, ought to be accounted unjust, when in rendering Evil for Evil, they pass the Bounds of Proportion or Equality; so he is truly just who acts justly with Deliberation, for sometimes a Man may do a just Thing willingly, but not deliberately.*

4. *But of those Wrongs that are not done voluntarily, some may be pardonable, others not; ¹ those are pardonable that are done not only by Men*

IV. (1) DIONYSIUS HALICARNASSENSIS lays down as a Maxim, that whatever is involuntary deserves Pardon. *Antiq. Rom.* Lib. I. (Cap. LVIII.) PROCOPIUS says, that when any Man is injured, either thro' Ignorance or Forgetfulness, the Sufferer ought to forgive the Offence. *Gothic.* Lib. III. (Cap. IX.) GROTIUS.

ignorant, but through pure Ignorance also. But if any be done by ignorant Persons, but not through pure Ignorance, yet through some Passion that exceeds the common Bounds of human Nature, they are no wise pardonable.

5. *Michael Ephesius* interpreting this Passage, as an Instance of what happens contrary to all Expectation, gives us the Case of a Son, who by the opening of a Door, has hurt his own Father: Or of a Man who in a solitary Place trying to shoot, has accidentally wounded a Person; and of *that which might have been foreseen, but without any evil Intent*, he alledges the Case of a Man shooting at random in a Highway. The same Commentator gives us an Example of *Necessity* in him, who is obliged by Hunger, or Thirst, to do any Thing. *Of natural Passions*, in Love, Grief, Fear: He says that one acts through Ignorance, when the Fact is unknown; as if a Man did not know a Woman was married; a Crime is done by a Person *ignorant*, not through pure *Ignorance*, when the Right is not known. But this Ignorance of Right may sometimes be excused, and sometimes not; all which well agree with the Opinion of the antient Civilians. There is a Place in *Aristotle* not unlike this, in his Book of the Art of Oratory: *Equity distinguishes between simple Faults and Injuries, and between simple Faults and Mischances; Mischances are those which could neither be foreseen, nor done with an ill Design. Simple Faults, those that might have been foreseen, but not done with an evil Intent; but Injuries, which have been done both designedly; and with a malicious Intent.* The Antients have remarked that *Homer* had a Notion of those different Sorts of Action: And on that Head alledge what the Poet ² relates in the last of his *Iliad* concerning *Achilles*.

Ἦουτε γὰρ ἐστ' ἄφρων, οὐτ' ἄσκοπος, οὐτ' ἀλιτήμων.

Not ignorant, nor rash, nor ill disposed.

6. The like Distinction is also in *Marcian*, ³ *We offend either purposely, through Passion, or accidentally. Purposely, as a Gang of Thieves do. Through Passion, as when a Man in Drink falls to fighting with Fists or*

2. *Ver.* 157, 186.

3. *Delinquitur autem aut proposito, &c.* Digest, *Lib.* XLVIII. *Tit.* XIX. De Poenis, *Leg.* XI. § 2.

Sword. Accidentally, as when in Hunting an Arrow levelled at a Deer, kills a Man. Those two which are done purposely and through Passion, Cicero thus distinguisheth, *In all Acts of Injustice it is highly to be considered,*⁴ *whether they be done by any Perturbation of Mind, which is generally short, and quickly over; or with premeditated Design.* For those are much slighter, which are done by some sudden gust of Passion, than they done deliberately and designedly.⁵ Philo in his Explanation of some particular Laws, says, *It is but half a Crime, which is not done deliberately.*

7. Of which Kind are those chiefly, which Necessity,⁶ if it does not justify, yet <635> excuses; for as Demosthenes⁷ argues against Aristocrates, *Necessity takes from us the Liberty of examining what we ought to do, or not to do; wherefore such Cases are not to be too strictly searched into by equitable Judges.* Which Point the same Author (Demosthenes) handles⁸ more largely, in his Oration of false Witness against Stephanus. As also

4. *Sed in omni injustitia &c.* De Offic. Lib. I. (Cap. VIII.) SENECA says, that an upright Judge often chooses to acquit a Person, tho' accused and convicted of having done ill, if his Repentance gives Reason to conceive good Hopes of him; and he finds his Fault did not arise from a confirmed habit of Wickedness. He will even punish (adds he) sometimes great Crimes with less Rigour than small ones, if the former have been committed, not out of Cruelty but Weakness, and the latter are the Effect of concealed and inveterate Malice. He will not punish the same Fault alike, if of two Criminals the one has been guilty through Negligence, and the other by premeditated Design. *Dimittit saepe eum, &c.* De Ira, Lib. I. Cap. XVI. GROTIUS.

5. *De Legib. Special.* Lib. II. p. 791. B. Edit. Paris.

6. See what we have said above, B. II. Chap. XX. § 29. and in this Chapter, § 29. Alcidas, the Lacedaemonian General, having caused many Prisoners to be put to Death, the Embassadors of Samos represented to him, that he called himself the Deliverer of Greece with a very ill Grace, whilst he put Persons to Death, who had not taken Arms against him, nor were his Enemies; because if they had joined the Athenians, they had been reduced to do so by Necessity. THUCYDID. Lib. III. (Cap. XXXII.) St. CHRYSOSTOM says that Enemies themselves know how to pardon Enemies, tho' they have suffered ever so great Injuries by them, when the latter have acted involuntarily. *De Provident.* V. The Misimians, as AGATHIAS relates, believed themselves not entirely unworthy of Pardon, and the Clemency of the Romans, because they had only committed the Offences, that had induced the latter to turn their Arms against them, out of brutal Rage occasioned by having been unjustly treated in several Respects. Lib. IV. Cap. VI.

7. P. 449. B.

8. P. 524. The Passage is quoted above, B. II. Chap. XX. § 29. Num. 2.

Thucydides, in his fourth Book,⁹ *It is highly probable, that GOD himself is willing to forgive those, who are compelled by War, or otherwise necessitated to do any Thing; for the sacred Altars have been ever allowed sure Places of Refuge for them to fly unto, as have unwillingly offended; and the Name of Crime is given to unlawful Actions, which are committed on purpose, and not to those which extreme Necessity gives Courage to commit.* The *Cerites* in *Livy*,¹⁰ thus address the *Romans*, *That they would construe that a deliberate Act, which was more justly to be called Force or Necessity.* And *Justin*¹¹ says thus, *The Act of the Phocians, tho' all condemned it for its heinous Sacrilege, yet it brought a greater Odium upon the Thebans, who perfectly forced them to it, than upon themselves.* And this is the Opinion of *Isocrates*,¹² *Of him who steals purely to keep himself from starving, he hath Necessity, a good Plea for Pardon.* Also *Aristides*¹³ says, *The Hardness of the Times is some Excuse for those that abandon their Allies.* Thus says¹⁴ *Philostratus* of the *Messenians*, that they did not receive those that were banished from *Athens*, *They could not safely do it, for Fear of Alexander, whom all Greece severely dreaded.* And thus we find in *Aristotle*,¹⁵ *Half*

9. *Lib. IV. Cap. XCVIII.* See what is said in DEUTERONOMY, *Chap. XXII. Ver. 26.* in regard to a Maid ravished in the Country and the Rabbi MAIMONIDES, *Duct. Dubitant. III. 41. GROTIUS.*

10. *Ne adpellarent consilium, quae vis ac necessitas adpellenda esset. Lib. VII. Cap. XX. Num. 5.*

11. *Factum Phocensium, &c. Lib. VIII. Cap. I. Num. 10.*

12. Our Author repeats these Words without saying from which Work of the *Greek* Orators he takes them. I am almost certain that there is no such Sentence in ISOCRATES; and I believe one Name is put here for another. Since I wrote this I am convinced of the Truth of my Conjecture, and have found the Thought, and even the Words in a Passage of PORPHYRY, to which our Author refers in *B. II. Chap. XX. § 29. Note 4.*

13. *Orat Leuctric. II. p. 145. C. Vol. II.*

14. *De Vit. Sophist. Lib. II. Cap. XV. § 2. p. 596. Edit. Olear.*

15. *Ethic. Nicomach. Lib. V. Cap. XI.* On the Contrary *Cleon*, to render the Cause of the *Mitylenians* odious, said, that they had with premeditated Design, laid Ambuscades for the *Athenians*, and in consequence deserved no Pardon, which is due only in Cases, where People act involuntarily, *Lib. IV. Cap. XL.* PHILO the *Jew* praises his Nation, for their making a Difference, when they punished Injuries done them, between such as are used to commit Insults upon others, and those who observe a quite different Conduct. For, adds he, it is brutal and barbarous to kill without Mercy

wicked, but not unjust, nor a Lier-in-wait. Themistius, in his Praises of the Emperor Valens, thus applies these Distinctions to our Purpose, ¹⁶ You have well distinguished between a real Injury, a Fault, and a Misfortune; ¹⁷ tho' you are not acquainted either with Plato, or Aristotle, yet you put in practice their Precepts; for you have not judged them worthy of the same Punishment, who were the Authors of the War, and those who afterwards were forcibly <636> engaged in it, and those who submitted to him who seemed Master of the Empire. But those you have condemned, those you have corrected, and the last received unto Mercy.

8. The same Author, in another Place, advises a young Emperor. Consider what Difference there is between a Misfortune, a Fault, and a direct Injury; and how it becomes a Prince to forgive the first, chastise the second, and severely punish the third. Thus, according to Josephus, ¹⁸ did Titus the Emperor punish only the principal in a Crime, μέχρῃς ἔργου, really; but the Multitude μέχρῃ λόγου, only by Reprimands. Bare Misfortunes neither deserve Punishment, nor engage us to make any Restitution; but

all who come in the Way, without distinguishing those who have had little or no Share in the Offence. *De constit. Princip.* (p. 734. B.) GROTIUS.

16. *Orat. de laud. Valent. Imp.* SENECA observes, in speaking of Jupiter's Thunderbolts, that if the Antients believed that God sometimes threw small ones, it was to instruct those who are charged with the Care of Punishing, and fulminating, to use that Expression, against the Crimes of Men, that they are not always to strike in the same Manner: That there are Cases wherein the Whole is to be broken, others in which slightly hurting is sufficient, and some where only shewing the Bolt is enough. *Illos vero altissimos viros, &c.* Natur. Quaest. Lib. II. Cap. XLIV.

17. Such was Trajan, one of the best of the Roman Emperors. XIPHILINUS gives him this Praise, in his Life, (p. 230. *Edit. Rob. Steph.*) HERODIAN also says in praise of Marcus Antoninus, that he was the only Emperor who applied himself to Philosophy, in which he shewed the Progress he had made, not by his Discourse, or the vain Ostentation of Science, but by the Gravity of his Manners, and the Regularity of his Life. (Lib. I. Cap. II. Num. 6. *Edit. Boecler.*) MACRINUS, another Roman Emperor, observed the Laws more exactly than he was acquainted with them. XIPHILINUS, *in ejus vit.* (p. 342.) GOD grant us such good Princes in these Days! GROTIUS.

18. *De Bell. Jud.* Lib. V. Cap. XIII. (VI. 5. *Latin.*) p. 912. B. The Emperor gives this as a general Maxim, that when a single Person has committed the Offence, it is necessary to punish him really; but when a Multitude are criminal, it suffices to menace them. So that we see our Author does not exactly give the Sense of the Jewish Historian.

unjust Actions are obnoxious to both. But the Fault of a middle Nature, as it is liable to Restitution, so often it does not merit Punishment, especially capital. To this we may refer that of *Valerius Flaccus*.

*At quibus invito maduerunt sanguine dextrae,
Si sors saeva premat miseros, sed proxima culpa
Hos variis mens ipsa modis agit, & sua carpunt
Facta viros resides ———*

*But those who by Chance imbrue their Hands in Blood,
Press'd by Misfortune, tho' not the greatest Crime,
Yet conscious of a Guilt, feel Loads of Anguish,
Remorse distracts 'em, and the hideous Image
Still stares them in the Face.*

V. We meet with frequent Examples in History, of different ^a Punishments inflicted on the principal Authors of a War, and those who have been drawn into it (as *Themistius* observes); *Herodotus* ^b relates, that the *Grecians* took an exemplary Punishment on those who had been the chief Authors of the *Thebans* Revolt to the *Medes*. Thus (as *Livy* tells us) ¹ the principal Men of *Ardea* were beheaded. In the same Author, ² *Valerius Levinus*, having taken *Agrigentum*, he whipt their chief Leaders with Rods, and then beheaded them, the Rest, and the Prey, he sold. Also, in another Place of the same *Livy*, ³ When *Atella* and *Calusia* were surrendered, their Leaders were put to Death. Again, in another Place, ⁴ (he addresses the *Roman Senate*) Since the chief Authors of this Rebellion are deservedly punished by the immortal Gods, and by you, illustrious Fathers,

V. The principal Authors of a War to be distinguished from those drawn into it.

^a See *Gailius*, *De pace publ.* l. 2. c. 9. n. 18.

^b *Lib.* 9. c. 85.

V. (1) In all the Editions before mine they are called *Principes Ardeae*; that is to say, the principal Persons in the City, instead of the Ringleaders of the Insurrection. But I believed, that the Copists or Printers had left out the Word *seditionis*, from its Likeness to *securi*, which follows; tho' our Author never perceived it, as has happened to him in other Instances. However it was, the Original is, *Romanus Consul* [M. Geganius] *Ardeae turbatas seditione res, principibus ejus motus securi percussis, bonisque eorum in publicum Ardeatium reductis, composuit.* *Lib.* IV. *Cap.* X. *Num.* 6.

2. *Oppido recepto Levinus, &c.* *Idem.* *Lib.* XXVI. *Cap.* XL. *Num.* 13.

3. *Atellaque & Calatia, &c.* *Ibid.* *Cap.* XVI. *Num.* 5.

4. *Quoniam auctores defectionis, &c.* *Ibid.* *Lib.* VIII. *Cap.* XX. *Num.* 11. and *Cap.* XXI. *Num.* 10.

what do you intend to do with the innocent People? At last they were pardoned, and their Freedom restored; ⁵ to the End (as he says) where the Fault begun there the Punishment should stop. Eteocles the Argive is highly commended in Euripides, ⁶ because

*When he was Judge, the Guilty always bore
The Weight of their own Faults; the People never
Groan'd with the Burden of their Rulers Crimes.*

And the Athenians (as Thucydides relates) repented of their Decree against the Mitylenians, ⁷ That they should destroy the whole City, rather than the principal Authors of the Revolt. Demetrius is also reported by Diodorus, when he took Thebes, to have put only ten of the chief Leaders to the Sword.

VI. In the very Authors we must distinguish the Causes, whether probable, or improbable.

VI. 1. But also in the very Authors of the War, we must distinguish the Causes; for there are some, not indeed just, but yet such as may impose upon Men not really wicked. The Writer to Herennius lays down this as a most just Plea for Pardon, ¹ *If any one who hath offended, did it not out of Hatred or Cruelty, but out of Duty and good Design. Seneca's Wiseman, ² Will let his Enemies go off safe, even sometimes commended, if they were engaged in the War upon honest Grounds, out of Loyalty, according to the Obligations of an Alliance, for their Liberty.* The Caerites, in Livy, ³ beg

5. *Vicit sententia lenior, &c.* Idem. *Lib. XXVIII. Cap. XXVI. Num. 3.*

6. *Supplic. ver. 878, 879.*

7. *Lib. III. Cap. XXXVI.* The Sense of the last Words is clear; but there is some Difficulty in the Expression: Upon which the Reader may, if he pleases, consult a Note of the late Mr. PERIZONIUS, in AELIAN, *Var. Hist. III. 43. Note 4. p. 288.*

VI. (1) *Heic ignoscendi ratio queritur, &c. Lib. II. Cap. XVII.*

2. *Hostes dimittet salvos, &c. De Clement. Lib. II. Cap. VII.*

3. *Poenitebatque [Cerites] populationis, &c. Lib. VII. Cap. XX. Num. 2.* This is what the Historian says, and it appears by the Sequel, the Cerites excused themselves by saying, that having only given Passage to the Tarquinians, some Peasants purely by their own Authority, had joined them, in order to go and plunder the Lands of the Romans. Those Kinsmen, of whom our Author speaks, were therefore the Tarquinians. But a faulty Punctuation in all the Editions, not excepting the first, had so much disfigured the Passage, that it made the Phoceans, a People of Greece, the Relations of the Cerites, a People of Etruria. In this Supposition, the learned GRO-

Pardon for their Fault ⁴ in assisting their Kinsmen. The *Phocians*, ⁵ the *Chalcidians*, and others, who had aided *Antiochus*, according to their Treaty, were pardoned by the *Romans*. *Aristides*, in his second *Leuctrica*, speaks of the *Thebans*, who under the Conduct of the *Lacedemonians* marched against the *Athenians*, ⁶ *They were indeed engaged in an unjust Action, but with a fair Plea, they did it out of Fidelity to the Lacedemonians*.

2. *Cicero*, ⁷ in his first Book of Offices, says, they are to be pardoned who have not been cruel nor inhuman in the War. Also, that Wars undertaken for the Glory of Empire, are to be managed with less Severity. Thus King *Ptolemy* signifies to ⁸ *Demetrius*, that *They ought not to make War for every Kind of Reason, but only for Glory and Empire*. And so *Se-*

NOVIUS criticises our Author in this Place, and he takes great Pains to discover the Origin of a Fault which he finds in the following Period. This is one of the Places wherein the first Edition has been of most Use to me, and might alone shew how necessary it was to compare the Text with that Edition, and the others of antient Date. In the Margin there was *Appian. Syr.* That Citation being omitted, I know not how, in all the Editions I have seen, after the first, prevented GRONOVIVS from consulting the Historian from whom our Author had extracted the Fact, and whose Passage being found, immediately shews the faulty Punctuation, which ought to be placed to the Account of the Printers or Copists. See *Note 6.* of this Paragraph. So that the Fault of our Author consists in his not having perceived, that, contrary to his Intent, they had put *quod fuerint auxilio consanguineis* Phocensibus Chalcidensibus, & aliis, qui, &c. instead of *quod fuerint auxilio consanguineis*. Phocensibus, Chalcidensibus & aliis, &c. as I have printed it in my *Latin Edition*.

4. ISOCRATES says, that a conquered Prince ought sometimes to be pardoned, who did not know the Justice of the Conqueror's Cause. The Passage has been translated by AMMIANUS MARCELLINUS. *Ut ISOCRATIS memorat pulchritudo; cujus vox est perpetua docentis, Ignosci debere interdum armis superato Rectori, quam justum quid sit ignorantis.* Lib. XXX. (Cap. VIII.) GROTIUS.

I do not know whether the Passage of the *Greek Orator* is to be found amongst the Remains of his Works. At least the Words which the learned VALOIS cites from the *Oratio Panathenaica*, are entirely foreign to the Subject.

5. APPIANUS ALEXANDRINUS says this of the General *Manius Acilius Glabrio*. *De Bell. Syr. p. 160.* (98. *Edit. H. Steph.*) See *Note 4.* above.

6. *Orat. Leuctr.* II. p. 135. B. C. Vol. II. *Edit. Paul. Steph.*

7. *Partâ autem victoriâ, &c.* *De Offic. Lib. I. Cap. XI.*

8. PLUTARCH gives us this Saying of *Ptolomy's*, when he sent back the Baggage and Prisoners to *Demetrius*, after having defeated the latter in a Battle near *Gaza*. In *Vit. Demetr. p. 891.* A. Vol. I. *Edit. Wech.*

verus,⁹ in *Herodian*, *When we first took Arms against Niger, we had not any specious Pretences of Quarrel against him; but the Empire being the Prize disputed for, both of us with equal Ambition contended for it.*

3. That often happens, which *Cicero*¹⁰ observed in the War between *Caesar* and *Pompey*. *There was a great Uncertainty, the most famous Commanders were not agreed, many could not tell whose Cause was best.* And what he also says in another Place,¹¹ *Tho' we be guilty of a Failing, through human Frailty, yet we are certainly free from a Crime.* As in *Thucydides*, those Acts are positively declared pardonable which are done, *Not out of Malice, but through Error.* The same *Cicero*¹² says of *Dejotarus*, *He did not engage out of any Hatred to you, but slipt through common Frailty.* And *Salust*,¹³ in his History, *And the common People, more from Example than any Understanding of the Cause, flocked in one after another, and followed the foregoing Leader as the wiser.* What *Brutus* writ of Civil Wars, may not improperly be applied to all Wars,¹⁴ *We ought to be more severe in preventing them, than ready to discharge our Wrath upon the conquered.*

VII. *Even to Enemies who*

VII. 1. *Even where Justice does not demand it, yet it is often agreeable to Goodness[[,]]¹ to Moderation, and a great Soul to forgive. Salust²*

9. *Lib. III. Cap. VI. Num. 9. Edit. Boecler.*

10. *Erat obscuritas quaedam, &c. Orat. pro Marcell. Cap. X.*

11. *Etsi aliquâ culpâ tenemur erroris humani a scelere certâ liberati sumus.* (Ibid. Cap. V.) So *THUCYDIDES* lays down as a Maxim, καὶ ξυγγνώμη, &c. *Lib. I. Cap. XXXII. GROTIUS.*

12. *Neque enim ille [Dejotarus] odio tui progressus, sed errore communi lapsus est.* Orat. pro Reg. Dejot. Cap. III.

13. *Cetera multitudo vulgi, &c. Orat. I. ad Caesar. De Rep. ordinand. Cap. XXXIV. Lib. VI. Fragm. Edit. Wass.*

14. *Scribis enim, acrius, &c. CICERO, Epist. II. ad Brut. See BEMBO, Hist. Lib. IX. GROTIUS.*

VII. (1) *Theodorick*, King of the *Goths*, said, that the most successful Wars he had made, were those in which he had used Moderation in Victory. Moderation, adds he, is a continual Victory to him who knows how to manage it. *Illa mihi feliciter bella provenerunt, quae moderato fine peracta sunt, Is enim vincit adsidue, qui novit omnia temperare.* *CASSIODORUS, Var. II. 41. GROTIUS.*

2. *Et ignoscendo Populi Romani magnitudinem auxisse, &c. Orat. I. Philipp. Fragment. I. 13.*

says, that *The Romans advanced their Greatness by forgiving.* And *Tacitus*,³ *We ought to be as merciful to Suppliants, as implacable against Enemies.* But *Seneca*,⁴ that *It belongs only to wild Beasts, and even such as have no Spark of Generosity, to bite and tear those they have thrown down. Elephants and Lions, after they have slung on the Ground, what resisted them, leave it there, and go away.* The Situation of Things is often such that one may say, as it is in *Virgil*,

*have deserved
Death, often
times the Pun-
ishment may
rightly be
remitted.*

⁵ ——— *Non hic victoria Teucrûm
Vertitur, aut anima una dabit, discrimina tanta.
If I survive, shall Troy the less prevail?
A single Soul's too light to turn the Scale.* Dryden.

2. There is a remarkable Place to the same Purpose, in the fourth Book to *Herennius*.⁶ “Our Ancestors well observed, to put no captive King to Death. And why? It would be unjust to abuse that Power which Fortune hath bestowed on us to the Destruction of them, whom the same Fortune, a little before, had placed in the most eminent Station. But, you will say, he brought an Army against us! I now absolutely forget it. Why so? Because it is the Part of a brave Man to hold those his Enemies who dispute with him the Victory, and to consider them as Men, when vanquished; that so Valour may finish the Calamities of War, and Humanity augment the Advantages of Peace. But, you will say again, suppose he had got the Victory, would he have done the same? Why then should you spare him? Because it is my Practice to despise such Folly, not to imitate it.” If you understand this of the *Romans*, (which is very uncertain, since the Author often employs Reasons drawn from foreign Examples, or even such as are fictitious) it is absolutely repugnant to that which we meet with in the Panegyrick of *Constantine*, the Son of *Con-*

3. *Verum ita majoribus placitum, &c.* *Annal. Lib. XII. Cap. XX. Num. 4.*

4. *Muliebres est, furere in ira: Ferarum vero, nec generosarum quidem, praemordere & urgere projectos. Elephantum Lionisque transeunt, quae impulerunt.* *De Clement. Lib. I. Cap. V.*

5. *Aeneid, Lib. X. ver. 528, 529.*

6. *Item: Bene majores nostri, &c.* *Lib. IV. Cap. XVI.*

stantius. ⁷ “Tho’ he be the more prudent Man, who by a Pardon gains the Affection of <639> Enemies, yet he is the more valiant, who treads them under Foot when vanquished. You have revived, O Emperor! that antient Boldness of the *Roman* Empire, which always put the Generals of the Enemy, whom they had taken Prisoners, to Death. For then the captive Kings, after they had attended the triumphant Chariot of the Conqueror, from the Gates to the Forum, as soon as ever he turned his Chariot to the Capitol, were dragged to Prison, and there put to Death.

7. *Cautior licet sit, qui devinctos, &c.* (Panegy. *Vet.* VI. *Cap.* X. *Edit.* *Cellar.*) I am far from approving the Revival of the Custom the Orator speaks of. We see however that *Joshua* caused the Kings he had taken to be put to Death. JOSEPHUS, *Antiq. Jud.* Lib. V. *Cap.* I. *Cajus Sossius*, having defeated *Antigonus* King of the *Jews*, caused him to be whipped, being fastened to a Cross. DION CASSIUS, who relates this, (*Lib.* XLIX. *p.* 463. *D. Edit.* *H. Steph.*) adds wisely, that no conquered King had ever been used so by the *Romans*. There is the same History in JOSEPHUS, *Antiq. Jud.* Lib. XV. (*Cap.* I.) EUTROPIUS tells us, that *Maximianus Herculus* [or rather *Constantine*] having made the Kings of the *Franks* and *Germans* Prisoners, exposed them to fight with wild Beasts, in the magnificent Games he had prepared to exhibit. *Qui* [Constantin.] *in Galliis, &c.* Lib. X. (*Cap.* II. *Num.* 9.) See what AMMIANUS MARCELLINUS says of one of the Kings of the antient *Germans*, who was hanged, *Lib.* XXVII. (*Cap.* II.) *Theodorick*, King of the *Wisigoths*, caused *Athiulphus*, King of the *Suevi*, who had settled in *Spain*, to be put to Death, as JORNANDES tells us, in his History of the *Goths*, (*Cap.* XLIV.) These Examples ought to teach Kings to be moderate and discreet in Prosperity, and to reflect, that when God pleases, they are subject, as well as others, to the most unhappy Vicissitudes of human Events; in a Word, that according to *Solon*’s Thought, which *Croesus* called to mind in a like Danger, nobody can be deemed happy before Death. GROTIUS.

The last Fact is related by HERODOTUS, *Lib.* I. *Cap.* LXXXVI. As to *Antigonus*, King of the *Jews*, his Head was cut off by the Order of *Mark Antony*, whose Lieutenant *Sossius* was in *Syria*, and who, in favour of *Herod*, did not reserve that unfortunate Prince for the Day of his Triumph; and it is in this Kind of Death by which no conquered King had ever been punished before, that STRABO, whose Words JOSEPHUS has preserved, makes the Novelty of the Example consist, as appears also by PLUTARCH, *Vit. Anton.* *p.* 932. *C.* As to the Words of the antient Panegyrist, in which our Author corrects the manifestly corrupt Reading: The same had been done before him by the Jesuit JULIUS CAESAR BOULANGER, in his Book *De Spoliis bellicis, trophaeis, arcubus triumphalibus, & pompa triumphi*, *Cap.* XXVIII. *p.* 76. *Edit.* *Paris.* 1610. which is followed by the later Editions. The learned Civilian PETER DU FAURE, in his *Semestria*, *Lib.* II. *Cap.* III. *p.* 35. proposes another, which is not so natural. GRONOVIUS is also for having *calcat* STRATOS, instead of *calcat* IRATOS, read in the Beginning of the Passage.

Except only *Perseus*, who, by the particular Favour of *Paulus Aemilius*, (to whom he had yielded himself) escaped this severe Punishment. But the Rest, deprived of Life in a Prison, served as a Warning to other Kings, rather to court the Friendship of the *Romans*, than provoke their Justice.” But this Author expresses himself too generally. *Josephus* indeed mentions the like Severity of the *Romans*, in the History of *Simon Bar-jora*, who experienced it; but he speaks of Generals, such as *Pontius the Samnite*, not of those who had the Title of Kings. The Meaning of his Words may be taken thus. ⁸ “The Conclusion of the Triumph was when they were come to the Capitol, the Temple of *Jupiter*, for there, by antient Custom, the Conqueror staid, till he had Notice of the Death of the Enemy’s General. It was *Simon the Son of Jora*, who was led among the Prisoners in triumph: He then having a Halter about his Neck, was hurried to the publick Place, his Keepers also whipping him on: For in that Place it is the Custom of the *Romans* to put to Death, those that are condemned for capital Crimes. As soon then as it was declared that he was dead, they first offered up Vows, and then Sacrifices.” *Cicero* ⁹ almost writes the same of Punishments, in his Oration against *Verres*.

3. We have many Examples of Generals thus executed, and some of Kings, as ¹⁰ of *Aristonicus*, ¹¹ *Jugurtha*, ¹² *Artabasdus*. Yet besides *Perseus*,

8. *De Bell. Jud.* Lib. VII. p. 979. E. F.

9. *Tamen quum de Foro in Capitolium, &c.* In *Verr. Lib. V. Cap. XXX.*

10. He was the Bastard of *Eumenes*, King of *Pergamus*, and, notwithstanding the Will of his Brother *Attalus*, the legitimate Son, who had appointed the *Roman* People his Heirs, had taken Possession of the Crown. But he reigned in such a Manner that he was afterwards acknowledged lawful King, as *JUSTIN* insinuates, *Quum multa secunda praelia adversus civitates, quae metu Romanorum se ei tradere nolebant, fecisset; justus Rex jam videratur, &c.* Lib. XXXVI. Cap. IV. Num. 7. So that the Remark made here by *GRONOVIVS*, in Vindication of the antient *Romans*, is not entirely just. See *VELLEIVS PATERCULVS* concerning this Prince’s Death, *Lib. II. Cap. IV.* And *EUTROPIVS*, *Lib. X. Cap. I.*

11. See upon the Death of this King of *Numidia*, *LIVY, Epitom. Lib. LXVII.* and *EUTROPIVS, Breviar. Lib. IV. Cap. XI. in fin.*

12. Or rather *Artavasdes*, for so the *Roman* Authors write this King of *Armenia*’s Name. Here the learned *GRONOVIVS* remarks with Reason, that *Mark Antony* caused *Artavasdes* to be put to Death, by his own Authority, and without the Senate’s Approbation, after having taken him by Treachery, and led him in Triumph, not at *Rome* but *Alexandria*. *TACITVS* exclaims highly against that Perfidy. *Infida* [*Armenia*]

Syphax,¹³ <640> *Gentius*,¹⁴ *Juba*¹⁵ and, in the Time of the *Caesars*, *Caractacus*,¹⁶ and others, escaped this Punishment; whence it appears, that the *Romans* had Respect to the Causes of the War, and the Manner of prosecuting it; whom yet *Cicero*,¹⁷ and other antient Authors, do acknowledge to have been too cruel in their Victories. Therefore *M. Aemilius Paulus*, in *Diodorus Siculus*, well advised the *Roman* Senators, in the Case of *Perseus*.¹⁸ *Tho' they fear not the Power of Man, yet they ought to dread the Divine Vengeance, which is ready to fall on them who insolently abuse their Victories.* And¹⁹ *Plutarch* observes, that in the *Grecian* Wars, the very Enemies refrained all Violence to the *Lacedemonian* Kings, in Respect to their Dignity.

4. An Enemy then who hath not Respect purely to what human Laws allow, but what is really his own Duty, and what the Rules of Virtue

ob scelus Antonii, qui Artavasden Regem Armeniorum, specie amicitiae inlectum, dein catenis oneratum, postremo interfecerat, Annal. Lib. II. Cap. III. Num. 2. See VELLEIUS PATERCULUS, Lib. II. Cap. LXXXII.

13. The Historians do not agree about the Manner of this Prince's Death, who was King of Part of *Numidia*. Several make him die near *Rome*, before the Day of the Triumph, [at *Tibur* or *Tivoli*. See *LIVY*, at the End of the thirtieth Book. *Cap. ult. Num. 4.*] *POLYBIUS* on the contrary says, that he was led in Triumph. *APPIANUS ALEXANDRINUS* relates, that he died of a Distemper, whilst they were debating what to do with him. [*De Bell. Punic. p. 15. Edit. Steph.*] *GROTIUS*.

POLYBIUS says, that this conquered Prince died in Prison some Days after having been led in Triumph. *Lib. XVI. Cap. XII.* *SILIUS ITALICUS* seems to insinuate that only the Effigy of *Syphax* was carried in Triumph, *Punic. Lib. XVII. ver. 630.* where the Reader may see *CELLARIUS*'s Note, and that of Mr. *DRAKENBERG*, the last Edition.

14. He was a King of *Illyria*. See *LIVY, Lib. XLV. Cap. XLIII.*

15. He was the Son of the King of *Numidia*, and part of *Mauritania*. *Julius Caesar*, in the room of his Father, who was killed in a single Combat, led this young Prince, then an Infant, in Triumph. See *PLUTARCH*, in *Caesar. p. 733.* and *APPIANUS ALEXANDRINUS, De Bell. Civ. Lib. II. p. 491. Edit. H. Steph.* His Life was not only spared, but he was so well educated, that he became more celebrated for his Writings than his Birth, and the Shadow of Royalty conferred on him by *Augustus*. See upon that Head the Treatise of *VOSSIUS, De Historic. Graecis, Lib. II. Cap. IV.*

16. A petty King of the antient People of *Great Britain*.

17. Where he speaks of the Destruction of *Corinth*, *De Offic. Lib. I. Cap. XI.* and *Lib. III. Cap. X.*

18. *Excerpt. E. Lib. XXXI.*

19. *Vit. Agid. p. 804. E.*

require, will spare even his Enemy's Life; and will put no Man to Death, unless to save himself from Death, or something like it, or to punish personal Crimes that deserve Death. Nay, and to some of those that deserve it, either from a Principle of Humanity, or some other good Reason, he will either remit all Punishment, or at least the capital Part. The same forementioned *Diodorus Siculus* ²⁰ excellently observes, "The taking of Cities, successful Battles, and other Prosperities of War, are often more owing to Fortune than Valour. But to shew Mercy to the Vanquished is purely the Effect of Wisdom." We read in *Curtius*, ²¹ "Tho' *Alexander* had just Reason to be angry against the Authors of the War, yet he forgave them all."

VIII. As to Persons who are killed accidentally, and not on purpose, we are to remember what we said ^a above, that if not for Justice, yet for Pity, we must not attempt any Thing which may prove the Destruction of Innocents, unless for some extraordinary Reasons, and for the Safety of many. *Polybius* is of the same Opinion, who, in his first Book, thus speaks, ¹ "It is the Part of a good Man not to prosecute a War to the utmost, against those that are wicked, but only so far, till they have made Satisfaction for, and amended their Crimes, and not promiscuously to involve the Innocent in the Punishment of the Guilty, but, for the Sake of those Innocents, even to pardon the Guilty."

VIII. *We must take all possible Care that the Innocent be not, tho' against our Intention, kill'd.*

^a Chap. 1. of this Book, § 4. Num. 5.

IX. 1. These general Principles being laid down, it will not be difficult to infer more particular Rules. ¹ *Tender Age must excuse the Child, and her Sex the Wo-^{<64I>}man*, (says *Seneca*, in his Books against Anger). GOD himself, in the Wars of the *Hebrews*, even after Peace offered and

IX. *Children to be spared, and Women, unless highly criminal, and also old Men.*

20. *Lib. XVII. Cap. XXXVIII. p. 582. Edit. H. Steph.*

21. *Alexander, quamquam belli, &c. Lib. IX. Cap. I. Num. 22.*

VIII. (1) In the latter Part of this Passage, read *ἀναίτιους* instead of *ἐναντίους*, as in the Editions. *Lib. V. Cap. XI. GROTIUS.*

IX. (1) *Puerum aetas excuset, Foeminam sexus.* De Ira, *Lib. III. Cap. XXIV.* The Lion, when enraged, falls upon Men rather than Women, and does not hurt Children but when pressed with extreme Hunger, as an antient Naturalist observes. *Et ubi saevit* [Leo] *&c. PLINY, Lib. VIII. Cap. XVI. HORACE* representing *Achilles*, as a Warrior

void of Pity, that did not spare even Infants, without excepting those in their Mother's Womb; professes by a lively Exclamation, that he looks upon this as an horrible Excess of Fury.

Sed palam captis gravis, heu nefas heu!
Nescios fari pueros Achivis
Ureret flammis, etiam latentes
Matris in alvo.

Lib. IV. Od. VI. ver. 17. & seqq. An antient Scholiast observes upon this Passage, how much the Poet expresses his Dislike of such Barbarity, [HEU NEFAS] *Dolenter exclamat in saevitiam Achilles, qui si per Apollinem vivere licuisset, adeo saevus erat, ut nec infantibus, nec in utero gestantibus pepercisset.* PHILO the Jew says, that it was a Rule of War with his Nation, to release the Maids and Wives taken Prisoners, without doing them any Hurt, and he gives this Reason for it; that it would have been great Inhumanity to have destroyed with the Men that Sex, which their natural Weakness made incapable of War. *De Princip. constitut.* (p. 734. A. B. Edit. Paris.) He observes elsewhere, that between Persons at Years of Discretion, a thousand specious Reasons may be found to justify Quarrels and Enmity; but that as to Infants lately come into the World, Malice itself cannot make those innocent Creatures guilty of any Thing, with the least Appearance of Reason. *De special. Leg.* Lib. II. (p. 795. D.) JOSEPHUS speaking of *Manabem*, who, after taking the City of *Thapsus*, spared not even the Infants, calls that the utmost Excess of Cruelty and Barbarity. That Usurper, adds he, treated the People of his own Nation in a Manner that would have been unpardonable, even tho' he had to do with conquered Strangers. *Antiq. Jud.* Lib. II. (Cap. XI. p. 320. D.) The same *Jewish* Historian informs us, that *Judas Maccabaeus* having taken the Cities of *Bosra* and *Ephron*, put all the Males to the Sword, with all those who were capable of bearing Arms. [*Ibid.* Lib. XII. Cap. XII. p. 417. B. G.] In another Place he calls the Fury of *Alexander*, surnamed the *Thracian*, an inhuman Revenge, in causing the Wives and Children of the *Jews* to be put to Death with them, and before their Eyes. [*Lib.* XIII. Cap. XXII. p. 461. C.] AGATHIAS makes this Reflection upon the *Romans*, whatever just Reason they might have for punishing the *Missipians*, they were inexcusable, for having been so unmerciful to murder the Children at their Mother's Breasts, and who, consequently, could have no Share in their Father's Crimes: Nor did such Cruelty remain unpunished: (*Lib.* IV. Cap. VI.) NICETAS, or the Person who continues his History to the Reign of *Henry*, condemns in stronger Terms a like Excess of Hostility, committed by the *Scythians*, in taking the City of *Atyra*. They spared, says he, not even Infants at the Breast; those young Plants were cut down like Grass, or tender Blossoms, by those merciless Victors, who did not know that it is sinning against Nature, and violating the common Right of Men, to extend Rage beyond Victory, and to act with Fury against a reduced Enemy. (*In Vit. Balduin.* Cap. IX.) See also what BEDE says, *Lib.* II. Cap. XX. concerning the Cruelty of *Carevolla*; and the merciful Orders given by Queen *Elizabeth*, according to CAMB-DEN, upon the Year 1596. (p. 668.) SIMLER recites a good Law instituted by the *Swiss*, [which prohibits the doing any Injury to the Women, unless a Woman has furnished

refused, would have Women and Infants spared, (*Deut.* xx. 14.) only some few Nations excepted by a special Command, against whom the War was not a human War, but a War of GOD, as it was commonly called. And when he ordered the *Midianitish* Women to be slain for their own personal Crimes, he yet excepted those that were pure Virgins. (*Numb.* xxxi. 18.) Nay, when he denounced fearful Judgments on the *Ninevites*, for their enormous Sins, he was pleased to delay the deserved Vengeance, in Compassion of so many thousands, who could not distinguish between Good and Evil. (*Jonah* iv. 2.) Like to which is that in *Seneca*,² *Can any one be angry with Children, whose Age as yet understands not the Difference of Things?* And in *Lucan*,³

Crimine quo parvi caedem potuere mereri?

How could young Infants ever merit Death?

If then GOD, who, as the Author and Lord of Life, may, without Injustice, take it away when he pleases, and without any other Reason, from Persons of whatsoever Sex or Age, has, nevertheless, commanded, and acted himself towards Women and Children, in the Manner we have now seen; what ought Men (to whom he hath given no other Right over their Fellows, than what is necessary to preserve the Safety and Society of Mankind) to do in this Case?

2. We might add here, first, in Regard to Children, the Judgment of those Nations and Times wherein Justice most prevailed:⁴ *We carry Arms* (says *Camillus*, in *Livy*) *not against that tender Age, which is spared, even at the taking of Cities, but against those who are in Arms.* He adds, that this is one of the Laws of War, that is, one of the Rules of natural Right, which take Place here. *Plutarch*, treating on the same Subject, tell us,⁵ *Good Men observe even some Laws of War.* Where, pray observe, he saith

the Enemy with Arms, thrown Stones, or exercised some other Act of Hostility. *De Rep. Helvet.* Lib. II. p. 302. *Edit. Elzevir.*] GROTIUS.

2. *Num quis irascitur, &c.* *De Ira* Lib. II. *Cap.* IX.

3. *Pharsal.* Lib. H. ver. 108.

4. *Sunt & belli, sunt pacis jura, &c.* [Lib. V. *Cap.* XXVII. Num. 7.]

5. *Vit. Camill.* p. 134. B.

Good Men, that you may distinguish this Right from that allowed by Custom, and which only implies a bare Impunity. So *Florus* ⁶ says, it cannot in Honesty be otherwise. And *Livy* has it in another Place, ⁷ <642> *Which Age the Enemy, tho' highly provoked, should spare.* And again, ⁸ *Their savage Cruelty and Rage reached even to harmless Infants.*

3. There is no Exception here with Respect to Children, who have not as yet the Use of Reason. But as to Women, the Thing takes Place only in general, that is, unless they have committed some Crime which deserves a particular Punishment, or have usurped the Offices of Men. For that is, as *Statius* expresses it,

⁹ *Sexus rudis insciusque Belli,*
A Sex unskill'd, and ignorant of War.

The Prefect in the Tragedy, replies to *Nero*, calling *Octavia* his Enemy,

———— *Femina hic nomen capit?*

¹⁰ *Can a Woman deserve that Name?*

And *Alexander*, in *Curtius*, ¹¹ *I use not to make War with Captives and Women. He must be in Arms that I take for an Enemy.* So *Grypus*, in *Justin*,

6. In the Passage of that Historian, which our Author has in View, the Reading is *integra dignitate*. The Whole is as follows, *Eam namque vir sanctus & sapiens veram sciebat victoriam, quae, salva fide, & integra dignitate, pareretur.* Lib. I. Cap. XII. Num. 6. It relates to *Camillus* also, who would not take the Advantage of a Schoolmaster's Treachery.

7. *Puellis, ut saltem parcerent, orare institit; a qua aetate etiam hostes iratos abstinere, &c.* Lib. XXIV. (Cap. XXVI. Num. II.)

8. *Trucidant inermes juxta atque armatos, foeminas pariter ac viros, usque ad infantium caedem ira crudelis pervenit.* Lib. XXVIII. Cap. XX. Num. 6.

9. *Lib. I. Sylv. VI. ver. 53.*

10. *NER. Quod parcis hosti. PRAE. Femina hoc nomen capit?* Octav. (*ver. 864.*) For this Reason *Tucca* and *Varus* were for striking out of the *Aeneid*, the Verses where *Aeneas* deliberates whether he shall kill *Helen*. GROTIVS.

The Passage begins at the 567th, and ends at the 588th Verse. *Jamque adeo super unus eram, &c. Talia jactabam & furiata mente ferebar.* The Reader may see the Notes of Father CATROU, the last *French* Translator.

11. *Bellum cum captivis & foeminis gerere non soleo: Armatus sit oportet, quem oderim.* Lib. IV. (Cap. XI. Num. 17.)

¹² *None of his Ancestors after Victory did ever, in all their Wars, either foreign or domestick, shew Cruelty to Women, whom their very Sex did fully secure from the Hazards of War, and the Fury of the Conqueror.* And another, in Tacitus, ¹³ *That he never made War against Women, but only those that were actually in Arms against him.*

4. *Valerius Maximus* ¹⁴ calls the Behaviour of *Munatius Flaccus* against Women and Children, a barbarous Cruelty, and not fit to be mentioned; *Diodorus* ¹⁵ tells us, that the *Carthaginians*, at *Selinus*, killed old Men, Women, and Children, *without any Manner of Compassion.* And in another Place he calls this Act *a savage Cruelty.* *Latinus Pacatus* ¹⁶ stiled Women, *A Sex which the Wars spare.* And so did *Statius* of old Men.

¹⁷ ——— *Nullis violabilis armis*
Turba senes ———
Old Men should be from Violence secur'd.

X. I. What we have said (of Women and Children) may be generally said of all Men, whose Manner of Life is wholly averse to Arms. ¹ *By the Laws of War, only those that are in Arms, and do resist, are to be killed,* according to *Livy*, that is, that Law which is agreeable to Nature. So says *Josephus*, ² *It is just that they should suffer by Arms, who have taken up Arms, but the Innocent should not be <643> touched. When Camillus*

X. *Priests and Scholars to be spared.*

12. *Contra Gryphus orare, &c.* Lib. XXXIX. Cap. III. Num. 7.

13. The Historian makes *Arminius* say this in Regard to Women with Child. *Non enim se proditione, &c.* Annal. Lib. I. Cap. LIX. Num. 4.

14. *Efferatam crudelitatem suam, &c.* Lib. IX. Cap. II. Num. 4.

15. *Lib. XIII. (Cap. LVII. p. 360. Edit. H. Steph.)*

16. *Et in sexum, cui bella parant, in pace saevitum,* (Cap. XXIX. Edit. Cellar.)

17. *Thebaid. Lib. V. ver. 258, 259.*

X. (1) *Atque haec tamen hostium, &c.* Lib. XXVIII. Cap. XXIII. Num. 1.

2. This Reflection the *Jewish* Historian ascribes to *Vespasian* and *Titus*, who, notwithstanding the Instances of the People of *Alexandria* and *Antioch*, would not deprive the *Jews* settled in those two Cities of the Rights and Privileges they had enjoyed till then. Those of that Nation, said they, who took up Arms against us, have been sufficiently punished by the unfortunate Event of their Rebellion: For the Rest, who have done no Ill, it would be unjust to deprive them of what they possess. *Antiq. Jud.* Lib. XII. Cap. III. p. 398. D.

had taken the City of *Veii*,³ he ordered, that they should not hurt those that were not in Arms. In the first Rank of these ought to be held, those who are engaged in *holy Things*. For as it was in all Ages the general Custom of Nations to excuse them from bearing Arms,⁴ so were they excused also from the Violence of Arms. Thus the *Philistins*, tho' professed Enemies of the *Jews*, spared the⁵ College of Prophets at *Gaba*, as you may find, 1 *Sam.* x. 5. and 10. And so to another Place where was a like College, as it were set apart and privileged from all Violence, did *David* flee with *Samuel*, 1 *Sam.* xix. 18. *Plutarch*⁶ informs us, when the *Cretans* were engaged in Civil Wars, they mutually forbore all manner of Violence⁷ to the Priests, and those who had the charge of burying the Dead. To this we may apply the *Greek Proverb*,

3. *Et Dictator* [Camillus] &c. *LIVY, Lib. V. Cap. XXI. Num. 13.*

4. This merits particular Observation. The Security of Persons of this Kind, and of all others, whose Manner of Life has in itself no Relation to the Business of War, is founded upon the Supposition that they act nothing in any Manner against an Enemy. But if an Ecclesiastick abandons his Prayer-Book, to enter into the Councils of Princes, if he is the first Promoter of a War, and even takes the Field, and commands Troops, either directly or indirectly, he deserves to be spared the less, as he acts contrary to the Engagements of his Character. See *FELDEN's* Note upon this Place; and what is observed above, concerning the *Canons* prohibiting Ecclesiasticks to carry Arms. *B. I. Chap. V. § 4. Note 2.* and *B. II. Chap. I. § 13. Note 5.*

5. The Rabbins say, that *Hyrchanus*, at the very Time he besieged *Jerusalem*, sent Victims into the Temple. *PROCOPIUS* praises the *Goths*, for having spared the Priests of the Churches of *St. Paul* and *St. Peter*, which were at some Distance from *Rome*. *Gothic. Lib. II. (Cap. IV.)* See the Supplement of *CHARLEMAGNE* to *The Law of the Bavarians and Lombards*, *Lib. I. Tit. XI. Num. 14.* *GROTIUS.*

6. *Quaest. Graec. XXI. p. 296. C.*

7. *SERVIVS* informs us, that in *Italy* they paid this Regard to Priests and Priestesses, as well as to old Men, *Quia vatem. Nam eam defendebat a bellis, si non aetas, saltem religio Sacerdotis.* *Ad Aeneid. Lib. VII. (ver. 442.) GROTIUS.*

The Passage of *SERVIVS* does not relate to the Safety of Priests in Time of War; but he means that their Character excuses them from being concerned in Affairs of War. The Reader need only see the Sequel of the Discourse in the Verses of the Poet, to be assured that this must be the Commentator's Sense. As to the *Greek Proverb*, which our Author repeats, he took it from *SUIDAS*, at the Word *Πυρφόρος*. According to that Lexicographer, to express that no Quarter was given to any one, it was usual to say, *that not a single Priest had escaped*, that is not one of those who marched in the Front of the two Armies. They carried a Torch in their Hands, as the Scholiast upon *EURIPIDES* informs us in the *Phoenissae*, *Ver. 1386.* from whence they were called

Ἵουδὲ πυρφόρος ὑπελείφθη.

Not a single Priest escaped.

⁸ *Strabo* observes, when all *Greece* was up in Arms, the *Eleans*, as sacred to *Jupiter*, and those that sojourned among them, enjoyed a secure Peace.

2. They also have justly this same Privilege, as the Priests, who have embraced a like Sort of Life, as Monks, and ⁹ Lay-Brothers, that is, *Penitents*, whom the ¹⁰ *Ecclesiastical Canons*, according to natural Equity, would have spared equally as Priests. To these we may justly add those who apply themselves to the Study of Sciences and Arts beneficial to Mankind.

XI. Next to these, the Canons ¹ privilege Husbandmen. *Diodorus Siculus* ² highly commends the *Indians*, *In their Battles they kill one another (without Mercy)* <644> *but they do not Harm to the Husbandmen, as being necessary for the publick Good.* *Plutarch* says of the antient *Corinthians* ³ and *Megareans*, *None of them would in any wise hurt the Husbandmen.*

XI. *And also Husbandmen.*

Πυρφόροι, *Fire-bearers*: And in Consideration of their Character, no Hostility was exercised against them. ERASMUS, in his *Adages*, upon the Proverb, *Ne ignifer quidem reliquus est factus*, cites EUSTATHIUS in this Place, in *Iliad*, Lib. XII. Ver. 73. See also the Commentators upon POLLUX, *Lib. VIII. § 116. Edit. Amst.*

8. *Geogr. Lib. VIII. (p. 358. Edit. Casaub. Paris.)* See also POLYBIUS, *Hist. Lib. IV. (Cap. LXXIII.)* and DIODORUS SICULUS, *Excerpt. Peiresc. (p. 225.)* Those who went to Combat in the *Olympick, Pythian, Nemaean, or Isthmian Games*, enjoyed also an entire Security in Time of War. THUCYDID. *Lib. V. and VIII.* PLUTARCH, *Vit. Arat. (p. 1040. B.)* GROTIUS.

9. *Conversi, Converts*, which is not so common and intelligible in the Sense it is here used as *Lay Brother*, which is also derived from the *Latin Frater laicus*. These are Persons, who retire into Convents, but are not in Orders, do not sing in Choirs, nor make the Vow of Poverty. Our Author stiles them *Penitents*, because they were originally secular Persons converted, who engaged in that way of Life by way of Penance. See the Authors cited here by GRONOVIVS.

10. *Innovamus, ut Presbyteri, Monachi, Conversi, Peregrini, Mercatores, Rustici, euntes vel redeuntes, vel in agricultura existentes & animalia, quibus arant & semina portant ad agrum, congrua securitate laentur.* Decretal. *Lib. I. Tit. XXXIV. De Treuga & Pace, Cap. II.*

XI. (1) See the Canon cited in the last Note of the preceding Paragraph.

2. *Lib. II. Cap. XXXVI. p. 86. Edit. H. Steph.*

3. *Quaest. Graec. p. 295. B.*

And Cyrus sends to the Assyrian King,⁴ *He was desirous that Husbandmen should be secure and indemnified.* And Suidas⁵ says of Belisarius, *He was so favourably inclined to Husbandmen, and took such a particular care of them, that whilst he was General, there was no manner of Violence done to them.*

XII. *Merchants and the like.*

XII. Next to these the Canon¹ includes *Merchants*, which is not to be understood only of those who sojourn for a Time in an Enemy's Country, but also such as are natural and perpetual Subjects, because the manner of the Life they use is entirely averse from War: And under this Denomination are comprehended all Sorts of *Mechanicks* and *Tradesmen*, whose immediate Interest makes them more inclinable to Peace than War.

XIII. *And Captives.*

^a *Ch. 10. § 1. Note 1.*

^b *Sect. 9. of this Chapter, Note 8.*

XIII. 1. That we may come to those that bore Arms, I have^a already mentioned that of *Pyrrhus* in *Seneca*,¹ who said that Honour, that is, a regard to Equity, does not permit us to take away the Life of a Prisoner. We have quoted^b a Saying of *Alexander* to the same Purpose, who allows Captives the same privilege with the Women. We may add that of *St. Augustin*,² *In fight we ought not to kill the Enemy but through Necessity,*

4. He offered the King of *Assyria* to spare his Husbandmen, provided that on his Side he did no Hurt to the Husbandmen of those Provinces that had engaged in his Party. *Cyrop. Lib. V. Cap. IV. § 12. Edit. Oxon.*

5. *Voc. Βελισάριος.* GROTIUS.

XII. (1) See the *Canon* cited, § 10. *Note 10.*

XIII. (1) *Et in mancipio cogitandum est, non quantum illud impune pati possit, sed quantum tibi permittat, aequi bonique natura: Quae parcere etiam Captivis & pretio paratis, jubet.* De *Clement. Lib. I. Cap. XVIII.*

2. *Hostem pugnantem necessitas, &c.* Ad *Bonifac. Epist. CCV.* GRATIAN, in repeating this Passage, says in the beginning, *necessitas deprimat*, and not *perimat*, (*Caus. XXIII. Quaest. I. Can. III. ex Epist. CCVII.*) *Epaminondas* and *Pelopidas*, when they gained a Victory, never put any of the Conquered to Death, nor deprived any City of its Liberty: So that it was said of them, had they been present, the *Thebans* would never have treated the *Orchomenians* as they did: This *PLUTARCH* tells us, *Vit. Marcell.* (p. 316. D.) *Marcellus* acted with the same Lenity, at the taking of *Syracuse*, as the same Historian testifies, *Ibid.* (p. 308. D.) See also what he says in the Life of *Cato Uticensis*, (p. 787. C. D.) *TACITUS* says of *Primus Antonius*, and *Varus Arrius*: *Quos [Primum Antonium Varumque Arrium] recentes, clarosque rerum fama, &c.*

and against our Will. But as Violence is allowable against one that is in Arms, and in a Case of Resistance, so is Mercy due to the Vanquished, or Captive, especially where there is no danger of the Disturbance of the Peace thereby. Xenophon ³ reports of Agesilaus, He ordered his Soldiers not to punish their Prisoners as Malefactors, but to preserve them as Men. And we find in Diodorus Siculus, All the ⁴ Greeks in general engaged stoutly against those that resisted, but shewed Mercy to the Vanquished. The same Author also informs us of the Macedonians ⁵ under Alexander, They were more severe to the Thebans, than the Laws of War allowed.

2. Sallust, ⁶ in his History of Jugurtha, speaking of young Men, who were put to Death, after they had surrendered, says, it was done against the Law of Arms, <645> that is, against the Law of natural Equity, and the known Practice of all civilized Nations. And we read in Lactantius,

Hist. Lib. V. (Cap. XXXIX. Num. 4.) Cabades, King of Persia, having taken the City of Amida, as his Troops made a great Slaughter of the Inhabitants, a Priest represented to that Prince, that it was unworthy of a King to massacre the Conquered. PROCOPIUS. Persic. Lib. I. (Cap. VII.) The Author who relates this says elsewhere, that it is a vile Action to discharge one's Fury upon Prisoners of War. Lib. II. (Cap. IX. in the Speech of Cosroe to the Roman Embassadors.) See also, in the same Historian, the fine Speech of Belisarius to his Soldiers, after the taking of Naples. Gothic. Lib. I. (Cap. IX.) When Somebody advised the Emperor Alexis to put his Scythian Prisoners to Death, he replied: That the Scythians, tho' Scythians were however Men: And their having been our Enemies does not make them unworthy of our Compassion. ANNA COMNENA, (Lib. VIII. Cap. IV.) NICEPHORUS GREGORAS says, that whatever is done in the heat of Fight is excusable in some manner, because at that Time Men are not their own Masters, and act with a blind Impetuosity: But that when the Danger is over, and the Mind in its natural Situation has Time and Liberty to examine all Things aright, if they do not restrain their Power, it is a sign they pay no regard to what Decency requires, and trample upon all Consideration of Duty, Lib. VI. (p. 92. Edit. Colon. 1616.) See another Passage of the same Historian, which we have cited in a Note at the End of the seventh Chapter of this Book, and what CHALCOCONOYLAS says of a certain laudable Custom amongst the Poles, Lib. V. The Emperor JULIAN, in his Praise of Constantius, to give an Idea of a good Prince says, that when he had gained a Victory he put an immediate stop to the Slaughter, convinced that it was infamous to deprive People of their Lives, when they defended themselves no longer. (Orat. p. 86. C. Edit. Spanheim.) GROTIUS.

3. De Agesil. Cap. I. § 21. Edit. Oxon.

4. Lib. XIII. (Cap. XXIV. p. 434. Edit. H. Steph.)

5. Lib. XVII. (Cap. XIII. p. 568.)

6. Numidae puberes interfecti, &c. Bell. Jugurth. Cap. XCVI. Edit. Wass.

⁷ *They spare the Vanquished, and even in Arms there is room for Mercy.* Tacitus commends *Primus Antonius* and *Varus*, two Generals of *Vespasian*, *That after the Battle was over, they exercised no Cruelty to any.* So *Aristides* ⁸ says of the *Lacedemonians*, that *They fought vigorously against those who resisted, but shewed Mercy to them when conquered.*

The Prophet *Elisha* asks the King of *Samaria* this Question about Prisoners of War, *Wilt thou kill those whom thou hast taken Captive, with thy Sword, and with thy Bow?* 2 Kings vi. 22. In *Euripides*, ⁹ when one asked in the *Heraclidæ*,

Does your Law forbid the killing of an Enemy?

The *Chorus* answers,

Yes; when taken Prisoner in a Fight.

In the same Author *Eurystheus* the Captive says,

My Murderer shall be rank'd among the Guilty.

In *Diodorus Siculus*, ¹⁰ the *Byzantians* and *Chalcedonians*, because they had slain many of their Prisoners, were branded with this Character, *They committed Acts of abominable Cruelty.* The same Author in another Place calls ¹¹ to spare Captives, *The Law of Nations.* And they who transgress this Law, he says, without doubt, are guilty of a great Crime. Equity teaches us to be merciful to Prisoners, as we mentioned before out of the philosophical Treatises of *Seneca*. ¹² And Historians ¹³ highly com-

7. *Instit. Divin.* Lib. V. GROTIUS.

8. *Orat.* II. De Pace, (p. 80. C. Vol. II.)

9. Ver. 965, 966.

10. *Lib.* XII. *Cap.* LXXXII. p. 328.

11. *Lib.* XIII. *Cap.* XXVI. p. 344. CAPITOLINUS praises the Emperor *Marcus Antoninus* for observing the Rules of Equity even with regard to his Prisoners of War: *Aequitatem etiam circa captos hostes custodivit*, *Cap.* XXIV.

12. See Note (t) on this Paragraph.

13. Our Author makes this Reflection after ALBERICUS GENTILIS, (*De Jure Belli*, Lib. II. *Cap.* XVI. p. 344.) The latter alledges two Examples of this Kind, the one taken from BUCHANAN, and the other from PAULUS JOVIUS. In the first, we see, in the Reign of *Robert I.* King of *Scotland*, the Earl of *Mar*, having almost as many Prisoners as Troops of his own, contented himself with making them swear, that

mend those, who when the Multitude of their Prisoners has been so great, that the Number would be either chargeable or dangerous, have chose rather to send them all away freely, than to kill them.

XIV. 1 For the same Reasons, ¹ they that either in a Battle, or a Siege, shall demand Quarter, are to be accepted. Wherefore *Arrianus* ² says, that the *Thebans* killing of their Prisoners that had yielded, was not done according to the *Grecian* Custom, οὐκ Ἑλληνικὴν σφαγὴν. Likewise *Thucydides*, ³ in his third Book, *You received us unto Mercy, who voluntarily, and with Hands listed up, craved a Surrender. And it is the Custom of the Greeks not to put such to Death.* And the *Syracusan* Senators, in *Diodorus Siculus*, ⁴ tell us, *It is the Part of a great Soul to spare a Suppliant.* And *Sopater* ⁵ says, *It is the Law to preserve Suppliants in the Wars.*

XIV. Those to be accepted who surrender upon fair Terms.

2. In besieged Towns, the *Romans* observed this Custom before the battering Ram struck the walls. *Caesar* ⁶ declares to the *Aduatici*, he would save their City, <646> if they surrendered themselves before the Ram touched the Wall; which is still observed, *viz.* in weak Towns, be-

they would lie still, when the two Armies came to Blows, and should continue Prisoners even tho' the *English* should be strong enough to set them at Liberty. *Rerum Scotie*. Lib. IX. p. 320. *Edit. Amstel.* 1643. The Historian makes many Reflections in the same Place upon the Generosity and Humanity with which the Prisoners were treated. As to that of *PAULUS JOVIUS*, he speaks of the Duke *D'Anguien*, who after the Battle of *Cerisoles* released all the Prisoners, to rid his Camp of useless Mouths, that consumed his Provisions; and required only from them, that the *Spaniards* should return into *Spain*, and the *Germans* into *Germany* by the Way of *France*. *Hist. Lib. XLV. seu ult. circa init.* p. 267. Vol. III. *Edit. Basil.* 1556.

XIV. (1) The *Romans* informed the *Persians* besieged in the Citadel of *Petra*, that resolved as they seemed to perish, they chose rather to preserve their Lives, out of a Compassion worthy of *Romans* and Christians. *PROCOPIUS. Gothic.* Lib. IV. (seu *Hist. Miscell.* Cap. XII.) See *SERRANUS* in the Life of *Francis I.* and in that of *Henry II.* *GROTIUS.*

2. *De Expedit. Alexandr.* (Lib. I. Cap. IX.)

3. *Cap. LVIII.* *Edit. Oxon.*

4. *Lib. XI.* in fin.

5. Νόμος ἐστὶ τοὺς ἰκέτας σώζειν ἐν τοῖς πολέμοις.

6. *Ad haec Caesar respondit, Se magis consuetudine sua, quam merito eorum, civitatem [Atuaticorum] conservaturum, si prius, quam aries murum attigisset se dedidissent, &c.* *De Bell. Gall. Lib. I. Cap. XXXII.*

fore the playing of the Batteries; and in fortified Cities, before *the giving of a Storm*. But Cicero ⁷ considering not so much what is done, as what ought in Equity to be done, gives his positive Opinion thus: *As we ought to take Care of those we conquer, so we should take them into our Protection, who laying down their Arms, surrender to our Generals, tho' our Rams have battered their Walls*. The Hebrew Expositors ⁸ observe, that it was a Custom among their Ancestors, when they laid Siege to a Town, not to encompass it quite round, but to leave one Place free for them to escape, that desired to flee, that they might have less Occasion to shed Blood.

XV. *They are also to be spared that surrender without Conditions.*

XV. The same Equity commands us to spare those, who surrender to the Conqueror without Conditions in a suppliant Manner. ¹ *To kill those that have yielded*, (says Tacitus) is barbarous. And Salust ² relating how Marius put to Death the young Men of *Campsæ*, who had surrendered, calls it, *An Act against the natural Right of War*. And the same Author in another Place, *He put to the Sword not those that were in Arms, and in Battle, by the Right of War, but the very Suppliants that cried for Mercy*. And (as I beforementioned) in Livy, ³ *Killing of armed Men, and those*

7. *Et cum iis, quos vi deviceris, consulendum est, &c.* De Offic. Lib. I. Cap. XI.

8. See on that Head the Passages cited by SELDEN, *De Jure Nat. & Gent. secundum discipl. Hebr.* Lib. VI. Cap. XV. *in fin.* Our Author observes here in a short Note, that Scipio Aemilianus, at the Time he was preparing to destroy Carthage, made Proclamation, that whoever would, might quit it with Safety. He cites POLYBIUS to prove this in general, without referring to any Passage. But I can find nothing like it in that Historian, and am very much mistaken, if our Author had not in his Thoughts what he had read in FLORUS, upon the Summons made to the Carthaginians, when the Romans had resolved that they should quit their Country: *Tum evocatis principibus, si salvi esse vellent, ut migrarent finibus, imperatum*, Lib. II. Cap. XV. Num. 8. And perhaps his Memory at the same Time had recalled a confused Idea of the Proposals, Scipio caused to be made to Asdrubal by Gulussa, as POLYBIUS relates, *Excerpt. Peiresc.* p. 178. from whence arose this mixture of two Facts, and the confounding of two Authors.

XV. (1) *Quod aspernati sunt victores, quia trucidare deditos saevum, &c.* Annal. Lib. XII. Cap. XVII. Num. 2.

2. The Passage is cited in Note 6. upon § 13. of this Chapter. The other which our Author cites is: *Alios item non armatos, neque in praelio belli jure, sed postea supplices, per summum scelus interfectos.* Orat. de Rep. ordin. Cap. XXXVI. Edit. Wass.

3. In the beginning of § 10.

that resist, is allowed by the Right of War. And the same Livy again, ⁴ He made War upon those that had submitted, against all Equity and Justice. Nay, the chief Business of a General should be rather to force his Enemies thro' Fear to a Surrender, than to put them to Death. It was highly commendable in Brutus, ⁵ He suffered not his Men to fall on the Enemy immediately, but surrounding them with his Horse, bid his Soldiers spare those who shortly would be their own.

XVI. I. Against these Rules of natural Right and Equity, some Exceptions use to be made, no way just, viz. If it be done by way of Retaliation; if by way of Terror, to frighten others; or if they have been obstinate in their Resistance. But no Man can look upon this enough to justify a Slaughter, who has seriously weighed what has been said before of the just Causes of killing Enemies; For there is no Danger from Prisoners, or from those who have actually surrendered themselves, or desire to do it. That they may therefore be justly put to Death, there ought to be a previous Crime, and that such a one, as an impartial Judge shall think Capital. And so we sometimes see Prisoners, and those that have surrendered themselves, put to the Sword, and their yielding upon Condition to have their Lives spared, not accepted; if they being satisfied of the Injustice of the War, ¹ have still continued in Arms; if they have ²

XVI. Provided they were not guilty of some enormous Crime before, and how this is to be understood.

4. *Qui* [C. Popilius] *deditis, contra jus ac fas bellum intulisset, &c.* Lib. XLII. Cap. XXI. Num 3.

5. *Vit. Brut.* p. 996. A. I do not know, why our Author translates the Word *περὶ πεινυσε* by *equitatu circumdedit*. It only signifies, that Brutus rode about on all Sides to give Orders to his Troops not to charge the Enemy, and not that he invested them with his Cavalry.

XVI. (i) Our Author here had ALBERICUS GENTILIS in View, *De Jure Bell.* Lib. II. Cap. XVIII. where that Lawyer adds some other Cases. But I find no Example of this, unless that of Subjects, who have unjustly taken Arms against their lawful Sovereign, without any plausible Reason whatsoever, may be intended. See below, *Chap.* XIX. § 6. *Num.* 1. It was principally for this Reason, that in the War of the Peasants of Germany, which began in 1525. Count Truchses punished with an exemplary Death most of the Rebels, whom he had reduced to surrender. See the History of that Insurrection by PETER GNODAL, p. 292. & seq. *Edit. Basil.* 1570.

2. As the *Thebans* did when besieged by Alexander the Great, (DIOD. SICUL. *Lib.* XVII. *Cap.* IX. and XIII.) and the *Athenians*, besieged by Sylla. PLUTARCH, *De Gar-*

abused the Conqueror with slanderous Reproaches, if they <647> have³ broke their Faith, or any other Law⁴ of Nations, as the Privilege of Ambassadors; or if they have⁵ deserted their Colours.

2. But Nature doth not allow Retaliation, unless against the personal Offenders; neither is it enough to pretend, that the Enemies are but one entire Body engaged against us, as may easily be understood from what hath been already^a said concerning the Communication of Punishments. We find in Aristides,⁶ *It is not perfectly absurd, to imitate as just, what we ourselves condemn as wicked and unjust?* Wherefore *Plutarch*⁷ blames the *Syracusans*, for putting to Death the Wives and Children of *Hicetas*, purely because *Hicetas* had before killed the Wife, Sister, and Son of *Dion*.

^a B. 2. cb. 21.
§ 18.

3. The Benefit which may follow from hence, by striking a Terror for the future, does by no Means give a Right to put to Death. But if we are otherwise authorised to put to Death, this Consideration may engage us not to abate of our Right.

4. Further, an eager Desire to maintain our own Party, if the Cause itself be not absolutely dishonest, cannot really deserve Punishment, as the *Neapolitans* argue in *Procopius*; or if there were any Punishment due, it could never amount to that of Death, before an equitable Judge. When *Alexander* had commanded all the young Men⁸ in a certain Town to be put to the Sword, because they had made an obstinate Defence, he seemed to the *Indians* to make War like a Robber; whereupon the King

rulitate, Vol. II. p. 505.) GRONOVIVS gives us the first of these Examples. The latter had been cited before by ALBERICUS GENTILIS, (*ubi supra*, p. 377.) where the Reader may find several others. See also Dissertation XIX. of OBRECHT, intituled, *Hostis de-dititius*, § 24.

3. So *Julius Caesar* caused *Publius Ligarius* to be put to Death, who was perjured and perfidious. HIRTIUS, *De bello Africano*, Cap. LXIV. See other Examples in ALBERICUS GENTILIS, p. 379. & seq.

4. See also ALBERICUS GENTILIS here, p. 382.

5. Examples of this may be found in the same Author, p. 383. & seq.

6. *Orat.* II. De Pace, p. 75. C. Vol. II.

7. He calls this the most inhuman of *Timoleon's* Actions, who might if he had pleased have prevented that unjust Punishment. *Vit. Timoleon.* p. 252. C. See also DION's Life, p. 983. E. and DIODORUS SICULUS, *Biblioth.* Lib. XIV. Cap. XLVII.

8. POLYAEN *Strateg.* Lib. IV. Cap. III. Num. 30.

to avoid for the future such Reflections, shewed more Mercy in his Victories. He more honourably spared some *Milesians*, because they appeared brave and faithful to their own Country, which are the very Words of ⁹ *Arrian*. When *Phyto*, Governor of *Rhegium*, was hurried away to Torments and Death, for stoutly defending his City against *Dionysius*, he cried out, that he was thus barbarously used, because he would not betray his Country, and that Heaven would quickly revenge his Death. *Diodorus Siculus* calls it, ¹⁰ *unjust Punishment*. I much approve that Wish in *Lucan*, ¹¹

———— Vincat, quicumque necesse
 Non putat in Victos saevum distringere ferrum
 Quique suos cives, quod signa adversa tulerunt,
 Non credit fecisse nefas. ———

———— May he be crown'd with Victory,
 Who thinks it base to kill th' unhappy Vanquish'd;
 Tho' in the Battle, with Minds truly brave,
 They stood against him. ———

But we must understand by the Word *Cives*, not the Inhabitants of this or that Country, but all those who are Members of that great State, which comprehends all Mankind. Much less can the Resentment for a Loss received by War, render the shedding of Blood just and lawful; as we read that *Achilles*, *Aeneas* and *Alexander*, celebrated the Obsequies of their deceased Friends with the Blood of their Prisoners, or those that had yielded themselves; therefore *Homer* justly expresses it,

¹² Κακά δὲ φρεσὶ μῆδετο ἔργα.

And in his Mind did evil Things devise. <648>

9. *De Exped. Alex.* Lib. I. Cap. XX.

10. *Lib. XIV. Cap. CXIII.* p. 453. Edit. H. Steph.

11. *Pharsal.* Lib. VII. Ver. 312. & seq.

12. *Iliad* Lib. XXIII. Ver. 176. *SERVIVS* observes, that the Custom of putting Prisoners of War to Death upon the Tombs of the bravest Warriors, seemed in process of Time to have something cruel in it: *Sane mos erat in sepulchris virorum fortium*

XVII. *Offenders may be pardoned on account of their Multitude.*

^a See B. 2. c. 13. § 4.

XVII. But where the Crimes are such, as they really deserve Death, yet the Greatness of a Multitude may be some Plea to mitigate the Severity of the Punishment; a Pattern of which forbearing Mercy we have from GOD himself, who ^a ordered a Peace to be offered to the *Canaanites*, and their Neighbours, tho' notoriously wicked, with the Promise of Life under the Condition of being Tributaries. To this agrees that of ¹ *Seneca*, *Generals rigorously punish a Soldier, who alone commits any Fault; but where a whole Army is unanimously engaged in a Mutiny, a general Pardon is requisite. What abates then the Anger of a wise Man? The Multitude of Offenders.* And in *Lucan*, ²

*Tot simul infesto juvenes occumbere Letho,
Saepe fames, pelagique furor, subitaeque ruinae,
Aut Caeli, Terraeque lues, aut bellica clades,
Nunquam poena fuit. ———*

*At once so many Youths to hurry into Death,
Hunger may do it, or Shipwrecks, or the quick
Amazing fall of Buildings, or poyson'd Air,
Or blasting Damps, or War; it can't be Punishment.*

captivos necari: Quod postquam crudele visum est, placuit, &c. In *Aeneid*. X. (Ver. 519.) GROTIVS.

See the *Parrhasiana* of Mr. LE CLERC, Vol. I. p. 12, 13.

XVII. (1) *In singulos severitas Imperatoris, &c.* De *Ira*, Lib. II. Cap. X. The Scholiast upon JUVENAL cites a Passage from LUCAN, where he says, that Crimes committed by a Multitude pass with Impunity:

——— *Quidquid multis peccatur inultum est.*

[*Pharsal*. Lib. V. Ver. 260.] *Livia*, the Wife of *Augustus*, represented, that if every Thing were to be punished as it deserved, the greatest Part of Mankind would be destroyed. *Apud XIPHILIN. ex DION. CASS.* (p. 87. *Edit. Rob. Steph.*) St. AUSTIN says, that Crimes committed by a few Persons should be punished with Rigour: But when a Multitude are criminal, they should be instructed rather than commanded, and Reprimands preferred to Menaces: *Non ergo aspere, quantum existimo, &c.* Epist. LXIV. See GAILIUS, *De Pace publica*, Lib. II. Cap. IX. Num. 37. GROTIVS.

2. *Pharsal*. Lib. II. Ver. 198. & seq.

Therefore (Cicero³ tells us) to prevent the shedding of too much Blood, they brought in the casting of Lots. And Salust⁴ thus addresses Caesar, Neither does any one provoke you to severe Punishments, or fearful Judgments, which rather tend to depopulate a State, than to correct the Guilty.

XVIII. I. From what has been already^a mentioned, may easily be understood, what is allowable by the Law of Nature concerning Hostages. As it was formerly believed every one had the same Right over his own Life, as over other Things wherein he had a Propriety; and that this Right, by the Consent, either express, or tacit, of the Individuals, was transferred to the State, it was the less to be admired, if Hostages, personally innocent, were (as we¹ read) put to Death for the Crimes of their Country, whether by Vertue of their own particular Consent, or of the Publick, which may be inclusive of their own. But since a truer Wisdom has informed us, that GOD has reserved to himself the Power of our Lives, so that no Man can solely by his own Consent bestow upon another a Power either over his own Life, or that of his Subjects. Therefore (as *Agathias* writes) that good General *Narses* abhorred putting innocent Hostages to Death, as a brutish and cruel Act. So also have others done; witness the Example of *Scipio*, who used to say² that he would severely punish those who had rebelled, but not the innocent Hostages; neither would he take Revenge of an unarmed Person, but of an Enemy actually in Arms.

2. But what our modern Lawyers, and those not inconsiderable, maintain, that <649> such Agreements are valid, if authorised by Custom, I

3. *Ne autem nimium multi poenam capitis subirent, ideo illa sortitio comparata est.* Orat. *pro Cluent.* Cap. XLVI. See what I have said in my *Dissertation upon the Nature of Chance*, § 20.

4. *Neque quisquam te ad crudeles poenas, aut acerba judicia, invocat, quibus civitas vastatur magis, quam corrigitur, &c.* Orat. II. *Ad Caesar.* De Republ. ordinand. Cap. XL. p. 119. Edit. Wass.

XVIII. (1) See above, *Chap.* IV. of this Book, § 14. and ALBERICUS GENTILIS, *De Jure Belli*, Lib. II. Cap. XIX. p. 395.

2. *Neque se in obsides innoxios, sed in ipsos, si defecerint, saeviturum: Nec ab inermi, sed ab armato hoste poenas expetiturum.* LIVY, *Lib.* XXVIII. Cap. XXXIV. Num. 10. The Emperor *Julian* made the same Declaration as EUNAPIUS relates, *Excerpt. Legat.* I. (p. 213. Edit. Commelin.) GROTIUS.

XVIII. Hostages to be spared, unless personally faulty.

^a B. 2. ch. 21. § 2. B. 3. ch. 2. § 6.

allow, if they mean by Right, only an Impunity; which in this Case often comes under that Denomination. But if they suppose, that they who take away a Man's Life, only by vertue of such an Agreement, are really blameless, I am afraid they are both mistaken themselves, and by their own Authority dangerously mislead others. Indeed, if he that comes as an Hostage, is then, or was before, a notorious Offender, or has afterwards falsified his Faith given in weighty Affairs, his Punishment may then be just.

3. Yet when *Clelia*, who ³ not of her own accord, but by the Order of the State, went an Hostage, escaped by swimming over the *Tyber*, ⁴ *The Hetrurian King not only did her no Harm, but even commended her on account of her Bravery*: To use *Livy's* own Words in the Affair.

XIX. All needless Combats to be avoided.

XIX. This also is to be added, that all *Combats*, which are not of Use for the obtaining of Right, or concluding a War, but merely for vain Ostentation of Strength, that is, as the *Greeks* call it, *Rather a show of Strength, than a warlike Action*, [[¹]] are wholly repugnant to the Duty of a Christian, and Humanity itself. Therefore all Magistrates ought strictly to forbid these Things, for they must render an account for the unnecessary shedding of Blood to him, whose vicegerents they are; *Salust*, ² tho' a Pagan, commends those Generals, who purchase Victory with the least Blood. And *Tacitus* ³ writes of the *Catti*, a People of known Valour, *They seldom made Excursions, or had skirmishes with the Enemy*.

3. Some Persons, who had hid themselves to avoid being sent as Hostages, were punished for it as *NICETAS* informs us, *Lib. II (Cap. VII. in Vit. Isac. Angel.)* *GROTIUS*.

4. *Apud Regem Etruscum, non tuta solum, sed & honorata virtus fuit: Laudatamque virginem parte obsidum se donare dixit*, *Lib. II. Cap. XIII. Num. 9.* See what will be said below, *Chap. XX. § 54.*

XIX. (1) [[Footnote number missing in original, supplied from Latin text.]] These are *ARRIAN's* Words, *De Expedit. Alex. Lib. I. Cap. XXII.* *GROTIUS*.

2. *SALLUSTIUS duces laudat, qui victoriam incruento exercitu deportarent*, *EX SERVIO*, in *AEN. XI. Frag. p. 102.* *Edit. Wass.*

3. *Rari excursus & fortuita pugna.* German. (*Cap. XXX. Num. 5.*) *PLUTARCH* blames *Demetrius*, for exposing his Soldiers, rather for the sake of acquiring Glory by Combats, than any real Advantage. *Demetr. p. 908. C.* *GROTIUS*.

*Concerning Moderation in regard to the
spoiling the Country of our Enemies,
and such other Things.*

I. 1. That one may destroy the Things of another without the Imputation of Injustice, one of these three Things should necessarily go before. 1. Either such a Necessity as may be supposed to have been excepted in the primitive Establishment of Property. As when a Man, purely for his own Safety, shall throw the Sword of another Person, which a Madman was going to seize on, into a River; yet in that very Case he lies under an Obligation to make Satisfaction for it to the full Value; as I have ^a shewed in another Place, according to the most reasonable Opinion. 2. Or some Debt arising from an Inequality, that so what is wasted may be reputed, as taken in Satisfaction of that Debt, for otherwise it could not be lawful. 3. Or some Injury, that may merit such a Punishment, or which such a Punishment does not proportionably exceed. For as a judicious ^b Divine well observes, there is no manner of Justice, that a whole Kingdom should be laid waste, for the driving away of a few Cattle, or the burning of some Houses. Which is also allowed by *Polybius*, ¹ who would not have the Rigour of War be exercised *without Controul*, but just so far, that Wrongs and Punishments may be equally balanced: And for these Reasons, and with these Limitations, it may be done without Injustice.

<650>

I. What Spoil is just, and how far.

^a *B. 2. ch. 2.*
§ 9.

^b *Vict. de Jure bel. n. 52. and 56.*

I. (1) Our Author has already recited the Passage of that Historian, which he has here in View, in the preceding Chapter, § 8.

2. But unless it be for some Advantage, it would be very foolish to do another a Damage, without any Profit to ones self. Wherefore wise Men always propose to themselves some Advantage thereby, the principal whereof *Onosander* has observed, ² *Let him destroy, burn, and lay waste his Enemy's Country: For the want of Money and Provisions shortens the War, as Plenty lengthens it.* To which agrees that of *Proclus*, ³ *It is the Duty of a good General to straiten his Enemies as much as possible.* And thus says *Curtius* of *Darius*, ⁴ *He expected that he should be overcome by Famine, having nothing to sustain him, but what he could get by Spoil and Plunder.*

3. And that Waste and Desolation cannot be condemned, which quickly forces an Enemy to Peace: This way of making Wars did *Hal-yattes* use against the *Milesians*, the *Thracians* against the *Byzantians*, the *Romans* against the *Campanians*, *Capenates*, *Spaniards*, *Ligurians*, *Nervians*, and *Menapians*. But if we rightly weigh the Matter, such Things are for the most Part managed rather out of Spite than wise Counsel: For very often either those inducing Reasons cease, or there are others more powerful, that advise to the contrary.

2. *Stratagem*. Cap. VI. (p. 15. *Edit. Rigalt. 1590.*) GROTIUS.

The Reader upon this Passage of ONOSANDER's may see the Note of JOHN CHOKIER, p. 18, 19, of his Edition in 1610, but especially the full Part of JANUS GRUTERUS's Dissertations, printed as a Supplement to the Edition of REGAULT in 1604 with this Title: *Varii discursus, sive prolixiores Commentarii ad aliquot insigniora loca TACITI atque ONOSANDRI.* Our Author perhaps might have made Use of this Collection: For almost all the Passages which he cites in this Chapter, are in it, (p. 138. & seq.) with others in a much greater Number than in ALBERICUS GENTILIS, *De Jure Belli*, Lib. II. Cap. XXIII.

3. PHILO *Judaeus* insinuates that it is customary to ravage the Lands of the Enemy, that the Want of Necessaries may reduce them to surrender. *De vit. contemptat.* (p. 891. D. E.) The same Author speaking of the Ravages occasioned by an Irruption of the Enemy, says it is a double Misfortune to those who are exposed to it, as their Friends on the one Side suffer by Famine, and the Enemy on the other profits by the abundance of Provisions he carries off. *De Diris*, (init. p. 930. A. *Edit. Paris.*)

4. *Quippe credibat [Darius] inopiâ debellari posse nihil habentem nisi quod rapiendo occupasset.* Lib. IV. Cap. IX. Num. 8.

II. I. This happens first, when we have got such Possession of a Thing belonging to the Enemy, that he cannot any more enjoy the Fruits of it. To which the divine Law ¹ does properly refer, which allows wild Trees and unfruitful to be cut down, to make Fortifications and Engines of War; but those that bear Fruit to be preserved for Subsistence, giving this Reason, because Trees cannot, as Men may, rise up in Arms against us. Which ² *Philo*, by a Parity of Reason, extends also to fruitful Fields;

II. *No wasting of Things that may be profitable to us, and out of the Enemy's Power.*

II. (1) There is great Reason to believe, that the Law regards only the Siege of the Cities, which were in the Land of *Canaan*, intended for the Abode of the *Israelites*, as Mr. LE CLERC observes. So that it was not out of Consideration for the Conquered, that the Law-giver prescribed the Moderation here meant; since the Conqueror not only might, but was bound in Duty to put all to the Sword, without Distinction of Sex or Age, in the Cities of the seven Nations devoted to utter Extirpation; and in regard to the more remote Places, all the Favour the Besieged had to hope for, was that their Women and Children should be reserved for Slavery: Besides, it is doubtful, whether the male Infants were not included in the general Term of *Males*, for whom there was no Quarter, *Ver. 13*. What Probability is there then, that GOD should have in View any respect to the Goods of these People, over whose Lives he had given the *Israelites* such power. This does not hinder however, in my Opinion, but that a good Argument may be drawn from hence to our Author's Purpose. For if the Creator and supreme LORD of Mankind did not approve, that the *Israelites* should lay waste without Necessity the Lands of the People, against whom he had armed them in an extraordinary Manner, and had made them as it were the Executors of his terrible Judgments; much more would he not approve our doing so in ordinary Wars, often unjust, and undertaken without much Necessity, and wherein the Party, who boasts the most of the Justice of his Cause, is sometimes in the wrong.

2. *De creation. Magistrat.* (p. 734 C) There is another Passage of that *Jewish* Author, which tho' long, merits a Place here. MOSES, says he, *Extends Moderation and Lenity so far, that next to rational Creatures he makes Beasts the Object of it; and after them, even Plants; of which we must now speak, as we have sufficiently explained what regards Men and all animate Beings. The Lawgiver then forbid the cutting down of any Fruit Tree, the reaping of Fields of Corn before the Season, in a Word the spoiling of any of the Fruits of the Earth: And that in order that Mankind might have not only allowance of Food, and Things necessary for Life, but also of those for Pleasure. The Provision of Grain is indeed necessary for the Subsistence of Man, and the infinite Variety of Fruits, which the Trees bear, contributes to his Delight: Which Fruits also at certain Times of Dearth, may supply the Place of the most necessary Aliments. But MOSES goes farther: He even forbids wasting the Lands of an Enemy. He enjoins us to abstain from cutting down the Trees upon them, holding it unjust to discharge the Resentment, with which we are animated against Men, upon innocent Things. Besides which, it was his Design to teach us not only to think of the present, but extend our Views to the future, and to consider that in the Vicissitudes, to which all human Things are liable, it might easily happen, that*

and by a pathetic Fiction introduces the Law itself thus speaking to those who ought to observe it. *Why are you angry with Things inanimate, particularly those that are mild, and yield grateful Fruit? Do they, like Men, discover any hostile (or disobliging) Intentions against you? Do they deserve to be entirely rooted up, for what they do, or threaten to do against you? But they are very beneficial to the Conqueror, and afford a large plenty of Things immediately necessary, and even contribute to our Pleasures; Men do not only pay Tribute, but even Trees, and that of more Value in their proper Seasons, and also such as Man cannot live without.* And Josephus³ to the same Purpose says: If Trees could speak, they would cry out, and reproach us with Injustice, for making them suffer the Punish-

those who are to Day our Enemies will to morrow be our Allies, by the Effect of an happy Conference. Now in this Case, it would have been cruel to deprive our Friends of necessary Things, of which they might not have made Provision for the future. The Antients have indeed said with great Reason, that we ought to live with our Friends in such a Manner, as if we were not ignorant that they might one Day become our Enemies, and on the contrary that we ought so to act in regard to those with whom we are at Variance, as if we had Reason to hope for a Reconciliation. By the first a Resource is preserved for our own Security, and we guard against having Cause to repent too late of our too great Facility in discovering more, than is proper, by our Actions and Discourse. A most important Maxim, which states ought also carefully to observe; in providing during Peace for what is necessary in War, and during War for what regards Peace: So that, on the one Side, they do not confide too much in their Allies, as if no Change could happen, to induce them to become Enemies, and on the other, not entirely despair of an Enemy, as if it were not possible for him to become a Friend. But tho' we ought not to do any Thing in favour of Enemies, in hopes of a Reconciliation, we should not therefore vent our Rage upon Plants and Trees. Nothing of that Kind is at War with us: On the contrary all such Things are at Peace, and conduce to our good. Fruit Trees especially and cultivated Plants are very necessary to us, as their Fruits serve for our Nourishment, or something equivalent to it. We ought not therefore to make War upon what neither would nor could do us any Hurt. We ought not to cut down, burn, or root up Things, which Nature herself takes care to form and raise by the Waters with which she moistens them, and the Temperature of the Seasons, which she regularly brings on, in order that each revolving Year should pay tribute to Men, as to so many Kings. That wise and good Mother gives perpetual Force and Vigour not only to Animals, but Plants, especially such as are cultivated, that require the greatest Care, and are not so fruitful as those that are wild, De Humanitate, (p. 712, 713.)
GROTIUS.

3. He extends the Prohibitions of that Law so far, that he does not seem to except even the Case, wherein no other Wood could be found for forming the necessary Machines of War. *Antiq. Jud.* Lib. IV. Cap. VIII. p. 130. B.

ment of War, who were no Occasion of it. And hence it is, in my Opinion, that the *Pythagoreans* have derived their Maxim, ⁴ *That we ought not to destroy or hurt a cultivated Plant or Fruit-Tree.*

2. And *Porphyrus* ⁵ describing the Manners of the *Jews* (in his fourth Book of not eating living Creatures) esteeming their Custom to be (I suppose) the best Interpreter of their Law, enlarges it even to all Beasts serviceable to Husbandry, for he says *Moses* commanded to spare also these in War. But their *Talmud* Writings, and *Hebrew* Interpreters extend it yet farther, ⁶ declaring that this Law ought to reach to every Thing that may be destroyed without Cause, as the burning of Houses, the spoiling of Eatables and Drinkables. The wise Moderation of *Timotheus* the *Athenian* General agreed with this Law, who (as *Polyaenus* ⁷ relates it) *would not suffer a House or Village to be destroyed, or a Fruit-Tree to be cut down.* There is a Law also in *Plato*, ⁸ in his fifth Book *De Republica*, *forbidding to waste Lands or burn Houses.*

3. Much less ought it then to be allowed after a compleat Victory. *Cicero* ⁹ blames the destroying of *Corinth*, though they had in a gross Manner abused the *Roman* Embassadors. And in another Place ¹⁰ he calls that War, horrid, abominable, and spitefully malicious, which was made ¹¹ against Walls, Houses, Pillars and <652> Gates. *Livy* much commends

4. *De Vit. Pythagor.* § 99. Edit. Kuster. See also *DIOGENES LAERTIUS*, *Lib.* VIII. § 23.

5. That Philosopher speaks of the Sect of the *Essenes* in particular. *De abstin. Animal.* *Lib.* IV. p. 394. *Edit. Ludg.* 1620.

6. On the contrary, they are for having this Exception added: Unless the Fruit Trees are in Suburbs, or hinder shooting and throwing Darts against the Enemy. *GROTIUS*.

See the learned *SELDEN*'s Treatise, *De Jure Natur. & Gent. secundum discipl. Hebraeorum*, *Lib.* VI. *Cap.* XV.

7. *Strateg.* *Lib.* III. *Cap.* X. *Num.* 5.

8. *De Repub.* *Lib.* V. p. 471. A. *Vol.* I. *Edit. H. Steph.*

9. *Nollem Corinthum [Funditus sublatam.] De Offic. Lib.* I. *Cap.* XI. See also *Lib.* III. *Cap.* XI.

10. *Sed quid ego vestram crudelitatem, &c.* *Orat. pro domo sua.* *Cap.* XXIII.

11. There is a remarkable Letter of *Belisarius* on this Subject to *Totilas*, *Gothic.* III. *It was formerly esteemed an Effect of the Wisdom and Genius of great Politicians, to raise noble Structures; and to destroy them after they were built, the Part of Fools, not blushing to transmit to Posterity Tokens and Monuments of their Folly. It is manifest,*

the Mercy of the *Romans*, at the taking of *Capua*, that they did not exercise their Cruelty ¹² on the innocent Houses and Walls, by burning and demolishing them. *Agamemnon* says in *Seneca*,

¹³ *Equidem fatebor (pace dixisse hoc tuâ
Argiva tellus liceat) affligi Phrygas
Vincique volui: ruere, & æquari solo
Etiam arcuissem. ———*

*'Tis true, the Trojans (and I hope my Country
Forgives my Clemency) I thought to conquer;
But to apply th' Extremities of War,
Or raze their City, this I ne'er intended.*

4. Indeed holy Writ informs us, that some Cities were by GOD's especial Command entirely rased, *Joshua* vi. even against that general Law which we have mentioned, the Trees of the *Moabites* were ordered to be cut down, *2 Kings* iii. 19. But that was not done in Hatred to the Enemy, but in just Detestation of their Impieties, which were either publicly

that Rome is the biggest and most beautiful City of all the World (or that the Sun beholds) and that it could not arrive to that Greatness and Splendor, by the Labour of one single Man, nor in a short Time; but many Kings, and Emperors, an infinite Number of illustrious Persons, many Ages, and a prodigious Mass of Treasure, had drawn thither, as other Things, so also the most curious Artificers in the World. Thus Rome was formed by little and little, such as you now see it, full of the Monuments which each of those that contributed to its Improvement, has left of his Wisdom and Ingenuity. Wherefore to ruin or destroy it, would be injurious to Mankind of all Ages; to rob our Ancestors of the Memory of their just Praise; and future Ages the Pleasure of so glorious a Sight. Since Things then are thus, consider that one of these two must certainly happen; either you will be conquered or Conqueror in this War. If you be Conqueror, then by destroying the City, you destroy not what is another's, but your own; and by preserving it, you will enjoy the most beautiful Possessions in the World: On the other Side, if you should be vanquished, the preserving the City of Rome will be a great Argument to incline your Conqueror to shew Mercy to you, but if it be destroyed your Affairs will be lost beyond any Hopes of Mercy. And you will not only get no Advantage by doing it, but you will have such a Name from all Mankind, as such a Fact deserves. So it is in your Will to have Fame make her Report of you; for as the Actions of great Men are, so is their Reputation. See the Law of Frederick I. in CONRAD. Abbot of Ursperg, and concerning Frederick Count Palatine, MELANCTHON'S Chronide. GROTIUS.

12. *Ita ad Capuam res compositae, &c.* Lib. XXVI. Cap. XVI. Num. II, 12.

13. *Troad.* Ver. 276. & seq.

notorious, or esteemed worthy of such Punishment in the Sight of GOD.

III. 1. This will likewise happen, where the Possession is yet in Dispute, if there be great Hopes of a speedy Victory, of which those Lands and Fruits will be the Reward. Thus *Alexander the Great*, as *Justin* relates it, hindered his Soldiers from wasting *Asia*, ¹ declaring to them, that they should spare their own, *and not destroy those Things, which they came to possess*. Thus *Quintius*, when *Philip* overrun *Thessaly*, wasting it with Fire and Sword, exhorted his Soldiers (as *Plutarch* ² informs us) to march thro' the Country, as if it were now entirely their own. *Croesus* ³ advising *Cyrus* not to give up *Lydia* to be plundered by his Soldiers, tells him, *You will not ruin my Cities, nor my Lands, they are no longer mine, they are now become yours, they will destroy what is yours*.

III. *If there be probable Hopes of a speedy Victory.*

2. They who do otherwise, may apply to themselves the Words of *Jocasta* to *Polynices* in *Seneca's Thebais*.

⁴ *Patriam petendo perdis: Ut fiat tua,
Vis esse nullam: Quin tuae causae nocet
Ipsum hoc, quod armis uris infestis solum
Segetesque adultas sternis, & totos fugam
Edis per agros: Nemo sic vastat sua.
Quae corripi igne, quae meti gladio jubes,
Aliena credis.*

*You ruin your Country whilst you seek it; to make it yours
Its Being you destroy; it defeats your Claim <653>*

III. (i) *Inde hostem petens milites, &c.* Lib. XI. Cap. VI. Num. 1.

2. *Vit. T. Quint. Flamin.* p. 371. So *Gelimer*, and the *Vandals* under his Command when they besieged *Carthage*, avoided plundering, and laying waste the Country, preserving it as their own, as *PROCOPIUS* informs us, *Vandalic.* Lib. II. *init.* (Cap. I.) *HELMOLDUS* has a Reflection to the same Effect: *Nonne terra quam devastamus, nostra est; & populus, quem expugnamus, populus noster est? Quare ergo invenimur hostes nostrimet, & dissipatores vectigalium nostrorum?* Lib. I. Cap. LXVI. See something of the same Kind in *BEMBO, Hist.* Lib. IX. (Fol. 149. Ver. 1. *Edit. Venet.* 1551.) and in *PARUTA, Lib.* VI, concerning the *Germans*.

3. *HERODOT.* Lib. I. Cap. LXXXVIII.

4. *Phoeniss.* (sive *Thebaid.*) Ver. 558. & *seq.* Edit. Gronov.

*To level, thus in Arms, the ripen'd Harvest;
Is Fire and Sword, the Vengeance of an Enemy,
Applied to Spoil and Ravage what's ones own?
No, our deadliest Foes we thus afflict.*

To the same Sense are the Words of ⁵ *Curtius*, *Whatsoever they did not waste, they owned to be their Enemies*. Agreeable hereunto is that which *Cicero*, in his Letters to *Atticus*, says against the Design that *Pompey* had formed of taking his Country by Famine. Upon this Account *Alexander the Isian* blames *Philip* (in the 17th Book of *Polybius*) whose Words *Livy* ⁶ has thus rendered: *Philip dared not engage in a fair Field-fight, nor come to a pitch'd Battle, but flying away burned and plundered Cities; so that the Conquered rendered useless to the Conquerors what should have been the Recompence of Victory. But the old Kings of Macedon did not use to do so, they used to come to a fair Engagement, to spare Cities as much as possible, that they might have the more wealthy Dominion. For it is not a strange Conduct, to make War in such a Manner, that at the same Time, we dispute the Possession of a Thing, we leave nothing for ourselves but War.*

IV. *If the
Enemy can
be supplied
otherwise.*

IV. 1. In the third Place, this happens, if the Enemy can be supplied elsewhere, either by Sea or Land. *Archidamus* in *Thucydides*, ¹ in his Speech to dissuade his Subjects the *Lacedemonians* from a War with *Athens*, puts this Query, What Hopes had they to succeed in the War, whether, because they excelled in Number of Soldiers, they pretended to waste the *Athenian* Lands? But consider (says he) they have other Countries under their Dominion, (meaning *Thrace* and *Ionia*) and they might easily supply themselves by Sea, with whatsoever they wanted. Wherefore in that Case it were best to protect Husbandry even in the Frontiers of each Side: Which we have lately seen practised in the Wars of the *Low-Countries*, by paying Contributions to both Parties.

5. *Nullum desperationis illorum magis indicium esse, quam quod urbes, quod agros suos urerent: Quidquid non corrupissent hostium esse confessi.* Lib. IV. Cap. XIV. Num. 2.

6. *In bello non congregi [Philippum] aequo campo, &c.* Lib. XXXII. Cap. XXXIII. Num. 11, 12.

IV. (1) *Lib. I. Cap. LXXXI.*

2. And this is agreeable to the antient Custom of the *Indians*, among whom, as *Diodorus Siculus*² relates, *Husbandmen are indemnified and as it were sacred, so that they follow their Labour even close by the Camp, and near the Troops.* And he adds, *They do not burn the Enemies Lands, nor cut down the Trees.* And again, *No Soldier will willingly wrong Husbandmen, but esteeming them as common Benefactors, forbear doing them any manner of Injury.*

3. *Xenophon*³ informs us, that it was agreed between *Cyrus* and the *Assyrian King*, *That the Husbandmen should enjoy Peace, and that War should be made only against those that were in Arms.* Thus *Timotheus*, as *Polyaenus*⁴ relates, *Let out the fruitfulest Lands of the Country where he had entered with his Army:* Nay, (as *Aristotle*⁵ adds) *sold the very Corn to his Enemies, and with that Money paid his own Soldiers.* Which *Viriatus* also practised in *Spain*, as *Appian* witnesseth. And this very Thing we have seen done in the aforesaid *Low-Country War*, with great Prudence and Profit, to the Admiration of all Foreigners.

4. These Customs do the Canons, which are full of Lessons of Humanity, propose to our Christian Imitation, as being obliged to, and professing more Humanity than others; therefore they⁶ enjoin us to put not only the Husbandmen beyond the hazard of War, but also their Cattle with which they plow, and their Seed which they carry to the Field; it is undoubtedly for the same Reason that the Civil Law⁷ forbids

2. *Lib. II. Cap. XXXVI. p. 86. Edit. H. Steph. Cap. XL. p. 88.*

3. *Cyrop. Lib. V. Cap. IV. § 13. Edit. Oxon.*

4. *Stratag. (Lib. III. Cap. X. Num. 9.)* PLUTARCH says the same Thing of the *Megarians*, *Quaest. Graec. (XVII. p. 295. B.)* *Totilas*, when he marched to besiege *Rome*, hurt none of the Peasants of *Italy*: On the contrary he commanded them to till the Land as before, paying him the ordinary Contributions. PROCOP. *Gothic. Lib. III. Cap. XIII.* CASSIODORUS says, it is the highest Praise to those who defend a State by Arms, to act in such Manner during a War, that the Husbandmen should not discontinue their Labours in the Field: *Defensorum maxima laus est, &c. Var. Lib. XII. Cap. V. GROTIUS.*

5. *Oeconomic. Lib. II. p. 507. A. Vol. II. Edit. Paris.*

6. See the Canon cited at the End of § 10. in the preceding Chapter.

7. Besides the Advantage of Agriculture, Regard was had also to the Interest of the Revenue, which required, that the Debtors to it should not be rendered incapable of paying the Taxes in due Time: *Exsequutores, a quocumque judice dati, ad exigenda*

<654> to take in pawn any Thing belonging to Agriculture. And it was formerly prohibited among the *Phrygians* and *Cyprians*, afterwards⁸ with the *Athenians*, and then the *Romans*, to kill a plowing Ox.

V. *If the Things be of no Use for War.*

V. There are some Things of that Nature, that they can no way contribute either towards the making or maintaining of a War, which Things even common Reason will have spared during a War. To this Purpose is the Speech of the *Rhodians* to *Demetrius, the Taker of Towns*, with regard to the Picture of *Ialysus (one of the Founders of their Nation)* translated by *A. Gellius*.¹ *What Reason can you have to desire to destroy so excellent a Piece, † by burning our Houses? For if you vanquish us, and take the City, this Picture will also be entirely your own; but if you are forced to raise the Siege, pray consider, what a Disgrace it will be to you, because you could not overcome the Rhodians, you must needs make War with Protogenes a dead Painter.* *Polybius*² called it an Act of extream Madness to destroy those Things, which by being destroyed do not weaken the Enemy, nor advantage the Destroyer. Such are Temples, Portico's, Statues, and the like. *Cicero*³ much commends *Marcellus*, because *he took such a particular Care to preserve all the Buildings of Syracuse both publick and private, sacred and prophane, as if he had been sent with an Army, rather*

debita ea quae civiliter poscuntur, servos aratores, aut boves aratorios, aut instrumentum aratorium, pignoris causa de possessionibus non abstrahant, ex quo tributorum illatio retardatur. Cod. Lib. VIII. Tit. XVII. Quae res pignori obligari possunt, &c. Leg. VII. See *CUJAS, Observ.* IV. 20.

8. *AELIAN. Var. Hist.* Lib. V. Cap. XIV. See also *COLUMELLA, De Re Rust.* Lib. VI. *Princ.* *PORPHYRIUS, De non esu Animal.* Lib. II. (p. 173, & seq.) This was also the Custom in *Peloponnesus*, as *VARRO* informs us, *De Re Rustica.* Lib. II. (Cap. V.) In regard to the *Romans*, see *PLINY, Hist. Natur.* Lib. VIII. Cap. XLV. *VEGETIUS, De arte Veterinaria,* Lib. III. *GROTIUS.*

V. (i) *Mittunt Rhodii ad Demetrium, &c.* *AUL. GELL. Noct. Attic.* Lib. XV. Cap. XXXI. See *PLINY* upon this Head, *Hist. Natur.* VII. 38. XXXV. 10. and *PLUTARCH. Vit. Demetr.* (p. 898. E.) The Letter of *Belisarius*, which we have given above, § 2. Note II. includes the same Thought. *GROTIUS.*

† [[This is misprinted "Peace" in the original, and corrected by hand in some copies.]]

2. The Passage will be cited below, at the End of § 7.

3. *Itaque aedificiis omnibus, &c.* In *Verr. Lib. IV. Cap. LIV.*

to defend than take the City. And the same Author⁴ again, *Our Ancestors used to leave to the Conquered, what Things were grateful to them, but to us of no great Importance.*

VI. 1. But as this Maxim ought to be observed in regard to publick Ornaments, for the Reason aforesaid, so more especially in regard to Things dedicated to sacred Uses, for, although these also (as we have said^a elsewhere) are in some Sort publick, and therefore by the Law of Nations may be damaged or destroyed with Impunity, yet if no Danger can arise from the preserving of such Buildings, and their Appurtenances,¹ the

VI. *This especially ought to take in Things sacred, or thereto belonging.*

^a *Ch. 5. of this Book. § 2.*

4. *Apud eos autem quos, &c. Ibid. Cap. LX.*

VI. (1) It is, according to POLYBIUS, a Sign of excessive Folly to insult the Divinity, because you are angry with Men. *Excerpt. Peiresc.* That Author is in the Right: For, as the Emperor *Alexander Severus* said, it were better to pay the Divinity a religious Worship, whatever it be, in a Temple, than to give the Place to People, who make a Victualling-house of it: *Quum Christiani quemdam locum, qui publicas fuerat occupassent, contra Popinarii dicerent, sibi cum deberi, rescripsit, Melius esse, ut quomodo-ocunque illic Deus colatur, quam Popinariis dedatur.* LAMPRID. *Alex. Sever.* (Cap. XLIX.) The famous *Hannibal* spared the Temple of *Diana* at *Saguntum*, out of Respect for Religion: *Cui [Templo Dianae Saguntii] pepercit religione inductus Hannibal, &c.* PLINY, *Hist. Natur.* Lib. XVI. Cap. XL. APPIANUS *Alexandrinus* makes *Brutus* say, that it was the Custom of the *Romans* to leave even their foreign Enemies the Temples of their Gods. *De Bell. Civ.* Lib. III. (p. 516. *Edit. II. Steph.*) PLUTARCH relates, that the *Amphyctyons* objected to *Sylla's* Manner of treating them, the Moderation of *Flaminius*, *Manius Aquilius*, and *Paulus Aemilius*, the first of whom, when he had drawn *Antiochus* out of *Greece*, and the two others, after having conquered the Kings of *Macedonia*, not only spared the *Grecian* Temples, but adorned and enriched them with magnificent Presents. *Vit. Syll.* (p. 459. C. D.) The same Author praises *Agésilauus* for a like Respect to sacred Places: And before him, the *Latin* Author, who had writ the Life of that famous King of *Lacedaemonia*, affirms the same of him, and also that he held it Sacrilege to hurt those who had taken Refuge in Temples, and thereby implored the Protection of the Gods: *Tamen ante tulit irae religionem.—Itaque praedicabat, mirari se, non sacrilegorum numero haberi, qui supplicibus Deorum nocuissent; aut non gravioribus poenis adfici, qui religionem minuerent, quum qui fana spoliarent.* [CORNELIUS NEPOS, *Agésil.* Cap. IV.] See also VITRUVIUS, *De Architect.* Lib. II. (Cap. VIII.) DION CASSIUS, *Lib. XLII.* PLUTARCH, *Vit. Caesar.* (p. 720.) J. BRODAEUS, *Miscell.* Lib. V. (Cap. XXIX.) *Gabaon*, King of the *Moors*, tho' a Pagan, disproved the Conduct of the *Vandals*, who profaned the Churches of the *Christians*, and made them make Amends for their Irreverence. He hoped, that the Impiety of those People would be punished by the God of the *Christians*, whoever he were; as PROCOPIUS informs us, *Vandalic.* Lib. I. (Cap. VIII.) *Chosroez*, King of *Persia*, tho'

Reverence due to holy Things may be a sufficient Plea, especially with those who worship the same GOD according to the same Law, tho' they may differ in Opinions and Ceremonies. <655>

[[2.]] † *Thucydides*² says, it was a Law observed by the *Greeks* in his Days, *When they invaded the Lands of an Enemy, they mutually spared holy Places*. When *Alba* was destroyed by the *Romans*,³ *Livy* says the Temples were preserved. And *Silius* [[4]] in his 13th Book thus writes of the *Romans* taking *Capua*.

Ecce repens tacito percurrit pectora sensu
Religio, & Saevas componit Numine mentes,
Ne flammam taedasque velint, ne templa sub uno
In cinerem sedisse rogo.

Religion, by insensible Degrees
Steals on the Mind, and soothes the Breasts of Conquerors,
Lest in the universal Wrack of Cities,
The Temples of the Gods fall undistinguish'd.

The same *Livy*⁵ tells us, it was objected to *Q. Fulvius* the Censor, *That he had involved the People of Rome in the Crime of Sacrilege, by the De-*

no more a Christian than the other, spared the Church of the *Christians* at *Antioch*. *Idem, Persic. Lib. II. (Cap. IX.)* The Emperor *Justinian*, having found amongst the Spoils taken from the *Vandals*, the Things, which *Vespasian* had formerly taken out of the Temple at *Jerusalem*, and *Gizerich* had afterward carried from *Rome* into *Africa*, did not dare to keep them, and sent them back to *Jerusalem* to be placed in the Church of the *Christians*. *Idem, Vandalic. Lib. II. (Cap. IX.)* The Rabbi *BENJAMIN*, in his *Itinerary*, relates the Respect which the *Mahometans* have retained for the Place where the Bones of *Ezechieh*, and the three Companions of *Daniel* were buried. *GROTIUS*.

I do not find in any Part of *POLYBIUS*, the exact Words cited by our Author in the beginning of this Note. But there is the same Sense in two Passages of the *Excerpta Peiresciana*, p. 66. and 169.

† [[Paragraph number missing in text, supplied from Latin edition.]]

2. *Lib. IV. Cap. XCVII.*

3. *Templis tamen Deum (ita enim edictum ab Rege fuerat) temperatum est, Lib. I. Cap. XXIX. in fin.*

4. [[Footnote number missing in text, supplied from Latin edition.]] *Punic. Lib. XIII. Ver. 316. & seq. Edit. Drakenborg.*

5. *Et obstringere religione Populum, &c. Lib. XLII. Cap. III. Num. 9.*

struction of Temples, as if the immortal Gods were not the same in all Places, but that they of one Place should be honoured, and adorned with the Spoils of those of another. But *Marcus Philippus* being arrived at *Dius*, caused the Troops to encamp near the very Temple of that City, in order to secure it and all that was in it from Hostilities. *Strabo*^b writes, that the *Tectosages*, who with others had robbed the Temple of *Delphos*, to appease the injured God, did consecrate those Spoils, with some Addition, when they returned Home.

^b *Geogr.* l. 4.
p. 188. Ed. Par.
Casaub.

3. To come now to the *Christians*. *Agathias* relates, that the *Franks* spared the Temples of the *Greeks*, as being themselves of the same Religion with them. Nay, it was customary to save the Persons of Men in respect to Churches, which (not to quote Examples of Heathen Nations, whereof there are many, for Writers⁶ call this Custom, *A Law amongst the Grecians*) *St. Augustin* thus commends⁷ in the *Goths*, when they took Rome. The⁸ Churches consecrated to (the Memory of) Martyrs and Apos-

6. *DIOD. SICUL. Lib. XIX. Cap. LXXII. p. 705. Edit. H. Steph.*

7. *Testantur hoc Martyrum loca, & Basilicae Apostolorum, quae in illa vastatione urbis ad se confugientes, suos, alienosque receperunt. Huc usque cruentus saeviebat inimicus: Ibi accipiebat limitem trucidationis furor: Illo ducebantur a miserantibus hostibus quibus, [qui must undoubtedly be read in this Place: For *St. AUSTIN* distinguishes between those, who were moderate, and the less merciful; and *OROSIUS*, who relates the same Fact, *Lib. VII. Cap. XXVIII.* confirms this manner of reading:] *Etiam extra illa loca pepercerant, ne in eos incurrentes, qui similem misericordiam non haberent: Qui tamen ipsi alibi truces, atque hostili mare saevientes: Posteaquam ad loca illa veniebant, ubi fuerat interdictum, quod alibi jure belli licuisset, tota saeviendi refraenabatur immanitas, & captivandi cupiditas frangebatur.* *De Civit. Dei. Lib. I. Cap. I.* *ISIDORUS* has copied this Passage in *Chronic. Gotth.* upon the Year 447. The Fact happened under *Alarick*, an *Arian* Prince, of whom *CASSIODORUS* has preserved another memorable Action, by which he signalized himself upon the same Occasion. It was this; when the consecrated Vessels taken out of the Church of *St. Peter* were brought to him; he asked what they were, and upon being informed, he ordered them to be carried back into the Church by the same Persons, who had taken them out of it: *Nam, quum Rex Alaricus, &c. Var. Lib. XII. Cap. XX.* *GROTIUS.**

If *GRONOVIVS* may be believed, whose Note the Reader may see, there is nothing to be corrected in the Passage of *St. AUSTIN.*

8. The *Goths*, who besieged Rome under King *Vitiges*, spared also the same Churches, as *PROCOPIUS* informs us, *Gotthic. Lib. II. Cap. IV.* Even the *Barbarians*, not *Christians*, found an Asylum in these sacred Places. See *ZOSIMUS, Lib. IV. Cap. XL.* in regard to the *Tomitani*. The *Swiss* have a good Law upon this Head, recited

bles, in that general Devastation, secured all those that fled to them for <656> Refuge, whether Natives or Foreigners. So far the Rage of the Enemy extended without Controul, but here the Fury of Slaughter stopt; to these Places did the compassionate Soldiers convey their Prisoners, whom they had spared even without the Bounds of these Sanctuaries, from the Fury of their own Companions, that had less Tenderness than themselves; and they who otherways were inhumanly cruel, as soon as ever they came near any of those Places, where they were forbid to make use of their Right of War, immediately restrained their Eagerness to kill, and their Desire of making Prisoners.

VII. *Also burial Places.*

VII. 1. What I have said of sacred Things, the same may also be understood of Sepulchres, and even of Monuments that have been erected in Honour of the Dead. For even those (tho' the Law of Nations hath not exempted them from the Fury of the Conqueror) cannot be violated without Breach of common Humanity. The Lawyers maintain ¹ that whatever engages a religious Respect to burial Places, ought to be of very great Weight. There is a pious Saying of *Euripides* in his *Troades*, in regard to Sepulchres, as well as sacred Things,

² Μῶρος δὲ θνητῶν ὅστις ἐκπορθεῖ πόλεις,
 Ναούς τε τύμβους θ' ἱερὰ τῶν κεκμηκότων,
 Ἐρημία δοῦς αὐτὸς ὕστερον.

*Whoever ravages the silent Dead,
 Or impiously profanes their sacred Urns,
 Unwise I'll call him; for he ne'er reflects,
 That his own Dust may once be so disturb'd.*

by SIMLAR, *De Rep. Helvet.* (p. 302. Edit. Elzevir.) See also NICETAS, in the History of the Emperor *Alexis Comnenus*, (Cap. IV.) and the Place where that Historian blames the *Sicilians* for having profaned the Churches of *Antioch*. In Andronic. (Cap. IX.) GROTIUS.

VII. (1) *Nam summam esse rationem, quae pro religione facit.* Digest, Lib. XI. Tit. VII. De Religiosis & sumptibus funerum, &c. Leg. XLIII.

2. Ver. 95. & seq.

Apollonius Tyaneus ³ thus interpreted the Fable of the Giants fighting against Heaven, ὑβρίσαι εἰς τοὺς νεῶς αὐτῶν, καὶ τὰ ἔδη, *That they violated the Temples and Habitations of the Gods.* Hannibal is called sacrilegious by *Statius*, ⁴ for burning the Altars of the Gods.

2. *Scipio*, at the taking of *Carthage*, presented his Soldiers with large Donatives, χωρὶς τῶν εἰς τὸ Ἀπολλώνειον ἀμαρτόντων, says *Appian*, ⁵ *Except those who had profaned the Temple of Apollo.* The Trophy erected by *Mithridates*, *Caesar* (as *Dion* ⁶ relates) *durst not demolish, as consecrated to the Gods of War.* *Marcus Marcellus* ⁷ (as *Cicero* observes in his fourth Oration against *Verres*) would not out of Conscience touch those Things which Victory had rendered profane. And the same Author ⁸ adds, that there were some Enemies, who in War observed the Right of Religion, and of Customs. And he in another Place calls the Acts of Hostility which *Brennus* exercised against the Temple of *Apollo*, an ⁹ abominable War. *Livy* ¹⁰ calls the Action of *Pyrrhus* in plundering the Treasure of

3. PHILOSTRAT. *De Vit. Apoll. Tyan.* (Lib. V. Cap. XVI. Edit. Olear.) Thus DIODORUS SICULUS explains another antient Fable in this Manner, I mean that of *Epopæus*. GROTIUS.

It was in the *Excerpta*, published by HENRY DE VALOIS, our Author found the Passage he speaks of. But the Fable, which the Historian explains, is not there: He only relates that *Epopæus*, King of *Sicyone*, destroyed Temples and Altars: And he calls that, making War upon the Gods. The Passage is: Ὅτι Ἐπωπεὺς βασιλεὺς, &c. p. 221.

4. *Praecipue quum sacrilegus [Hannibal] face miscuit arces
Ipsius [Herculis]*

Sylv. Lib. IV. *Sylv.* VI. Ver. 82. Our Author, who does not mark the Place from whence he took these Words, probably quoting by Memory, changes *arces* into *aras*, and makes the Poet say: *Deum face miscuit aras.*

5. *De Bell. Punic.* p. 83. Edit. II. Steph.

6. *Lib.* XLII.

7. The Passage has been cited above, *Chap.* V. of this Book, § 2. *Note* 2.

8. A little before: *Quae [aedes Minervæ] ab eo [Verre] sic spoliata atque direpta est, non ut ab hoste aliquo, qui tamen in bello, religionis & consuetudinis jura retineret, sed ut a barbaris praedonibus vexata esse videatur.* In *Verr. Lib.* IV. *Cap.* LV.

9. *Quod contigisse Brenno dicitur, ejusque Gallicis copiis, quum fano Apollonis Delphici nefarium bellum intulisset.* De *Divinat. Lib.* I. *Cap.* XXXVII.

10. *Qui [Pyrrhus] quum ex Sicilia rediens Locros classe praeterveheretur, inter alia foeda—facinora—thesauros quoque Proserpinae intactos ad eam diem, spoliavit—Quae*

Proserpine, vile and insolent against the Gods. So does *Diodorus*¹¹ that of *Himilco*, ἀσέβειαν, καὶ εἰς θεοὺς ἀμαρτημα, <657> *impious, and sinful against the Gods*. The same *Livy*¹² terms the War of *Philip* execrable, as if made against both the coelestial and infernal Deities; nay, he calls it Madness and a Series of Crimes. And *Florus* on the same,¹³ *Philip, contrary to the Right of Victory, vented his Cruelty on the Temples, Altars, and even the Sepulchres of the Dead*. *Polybius*¹⁴ speaking of the same, passes this Judgment, *Who can call it any Thing else but an Act of downright Madness, to destroy those Things which can be of no Advantage to us, nor Prejudice to our Enemies, particularly Temples, Images, and such like Ornaments?* And here he doth not permit the Law of Retaliation, as a sufficient Excuse.

VIII. *The Advantages mentioned, which arise from this Moderation.*

VIII. 1. Tho' it be not properly my Design to enquire, what it is advantageous to do or not to do, but to reduce the extravagant Licence of War to what natural Equity allows, or what is best among Things lawful; yet Vertue itself, little esteemed in this Age, ought to forgive me, if, whilst she is by [*sic*: for] herself neglected, I endeavour to render her valuable on the account of her Advantages. First then, Moderation observed in preserving those Things which do not lengthen out the War, takes from the Enemy a powerful Weapon, Desperation. *Archidamus* thus speaks in *Thucydides*,¹ *Look upon the Enemy's Country as an Hostage, and so much the surer the better it is cultivated, and with the more Reason to be spared,*

tantâ clade edoctus, tandem Deos esse superbissimum Rex, pecuniam omnem conquistam in thesauros Proserpinae referri jussit, Lib. XXIX. Cap. XVIII. Num. 4, 6.

11. *Lib. XIV. (Cap. LXIV. p. 430. Edit. H. Steph.)*

12. *Adeo omnia simul divina humanaque jura polluerit, ut priore populatione cum infernis Diis, secunda cum Superis, bellum nefarium gesserit*. Lib. XXXI. Cap. XXX. Num. 4. *In Deos superos inferasque nefanda ejus scelera, &c.* Ibid. Cap. XXXI. Num. 3. *Praebuit huic furori materiam, &c.* Cap. XXVI. Num. 11.

13. *Quum ille [Philippus] ultra jus victoriae in templa, aras, & Sepulcra ipsa saeviret*, (Lib. II. Cap. VII. Num. 4.) *POLYBIUS* relates, and at the same Time condemns in the strongest Terms, a like Action of *Prusias*, King of *Bithynia*. The Passage is in *SUIDAS*, at the Word *Προνοσίας*, and in the *Excerpta Peiresciana*, (p. 169. Edit. Paris. p. 1468. Edit. Amstel.) *GROTIUS*.

14. *Lib. V. Cap. XI.*

VIII. (1) *Lib. I. Cap. LXXXII.*

lest *Despair should render the Enemy more invincible.* ² The same was the Advice of *Agesilaus*, when against the Opinion of the *Achaean*s, he gave the *Acarnanians* free Liberty to sow their Corn, saying, the more they sowed, the more desirous they would be of Peace. And to this Purpose in the Satyr,

³ *Spoliatis arma supersunt.*

The Plunder'd still have desperate Arms.

Livy tells us, when the *Gauls* ⁴ had taken *Rome*, their chief Commanders would not let all the Houses be burnt; that what they left standing of the Town, might be as a Pledge to bend the Minds of the Besieged.

2. Besides, the sparing of an Enemy's Country during a War, looks as if we were pretty confident of Victory. And Clemency is of itself proper to soften and pacify the Minds of Men. *Hannibal* (according to ⁵ *Livy*) wasted none of the Lands of the *Tarentines*, *not out of Moderation, either in General, or Soldiers, but to gain the Tarentines to his Party.* For the same Reason did *Augustus Caesar* ⁶ forbear plundering *Pannonia*. *Dion* gives the Reason, *He hoped to win them without Blows.* And *Timotheus* by doing what we have before mentioned of him, proposed to himself (as *Polyaenus* ⁷ relates) among other Things, *to gain the Affections of his Enemies.* *Plutarch* ⁸ speaking of the Moderation of *Quintius*, and the *Romans* that were with him (in *Greece*) adds this, *They quickly reaped the Benefit of this Forbearance, for as soon as he came into Thessaly, the*

2. XENOPH. *Hist. Graec.* Lib. IV. (Cap. VI. § 13. *Edit. Oxon.*) PLUTARCH also mentions this in his *Life of Agesilaus*, (p. 608. B.) GROTIUS.

3. JUVENAL viii. 124.

4. *Et non omnia concremari tecta, &c.* Lib. V. Cap. XLII. Num. 2.

This is an Imitation of the Passage in THUCYDIDES, cited in *Note 1.* of this Paragraph, as MATTHIAS BERNERGER pretends in his *Observationes Miscellae*, published at *Strasburgh* in 1669. *Obs.* XII. where he says many Things, and alledges many Authorities entirely the same as in this Place, without however quoting our Author, who had writ long before him.

5. *In Tarentino domum agro pacatum, &c.* Lib. XXIV. Cap. XX. Num. 10.

6. *Lib.* XLIX. p. 472. D. E. *Edit. H. Steph.*

7. *Strateg.* Lib. III. Cap. X. § 9.

8. *Vit. Flamin.* p. 371. D.

Cities readily yielded to him. The Greeks also which dwelt within the Thermopylae, earnestly desired his coming; and the Achaeans renouncing the Friendship of Philip, immediately confederated with the Romans against him. Frontinus ⁹ *informs us, that a City of the Lingones having escaped the plundering they were afraid of, in the War made by Domitian, under <658> the Conduct of Cerealis, against Civilis the Batavian, and his Associates; Because beyond their Expectation, they had lost nothing of their Goods, submitting to his Obedience, they furnished him with 70,000 Men well armed.*

3. Contrary Counsels have met with contrary Success. *Livy* ¹⁰ *gives an Instance in Hannibal, Giving himself up to Covetousness and Cruelty, he destroyed what he could not keep, that he might leave nothing to the Enemy but wasted Lands. And this Counsel was wretched both in the beginning and in the End. For he not only lost the Affections of those whom he thus barbarously used, but of all others also, who were afraid of being exposed to the like Desolation.*

4. I readily agree to what has been observed by some Divines, that it is the Duty of supreme Powers, and of Commanders who desire to be thought *Christians* by GOD and Man, to prevent the merciless plundering of Towns, and the like Acts of Hostility, as cannot be done without infinite Loss to Multitudes of innocent People, and be but of little Advantage in regard to the principal Affairs of War. Such Sort of Violence is almost always contrary to Christian Charity, and commonly to Justice itself. There is certainly a greater Bond among Christians, than there was formerly among the *Grecians*, in whose Wars it was enacted by a Decree of the *Amphictyones*, ¹¹ that no *Grecian* City should be pillaged. And some antient Writers ¹² affirm, that *Alexander the Macedonian* repented of nothing more than his destroying of *Thebes*.

9. *Auspiciis Imperatoris* Caesaris Domitiani, &c. *Strateg.* Lib. IV. Cap. III. Num. 14.

10. *Praecepta in avaritiam & crudelitatem, &c.* Lib. XXVI. Cap. XXXVIII. Num. 3, 4.

11. This the Orator AESCHINES informs us: *De male obita legat.* p. 262. A. Edit. Basil. 1572.

12. See PLUTARCH, in the Life of that famous Conqueror, p. 671. B.

Moderation about Things taken in War.

I. 1. But the taking away of our Enemies Goods in a just War, is not to be reputed wholly innocent, or clear from the Obligation of Restitution. For ¹ if we respect that which is done rightly, it is not really lawful to take, or keep from the Enemy more than may be justly due from him, except what Things (beyond the same due) we are obliged to detain for our own necessary Security; but when the Danger is over, they are also to be restored, either in Kind, or to the full Value; according to the Principles we have laid down in the second Book, *Chap.* II. For what we may lawfully do with the Goods of those that are at Peace with us, we may do it much more to those of our Enemy. This then is a Sort of Right to take, without a Right of acquiring.

I. That so much of the Goods of the Enemies Subjects taken in War, may be detained, as comes to the Value of what is due to us.

2. But since a Debt may arise to us, either from the Inequality of Things, ² or by way of Punishment, we may on either of these accounts seize on the Goods of the Enemy, but with some Difference; for as we

I. (1) See the Opinion of Pope *Innocent* related by BEMBO, *Hist.* Lib. I. GROTIUS. This was Pope *Innocent* VII. whose Nuncio's declared in his Name at *Trent*, that the Emperor *Sigismund*, having been the Aggressor in the War with the *Grisons*, and the *Venetians* at great Expences to support that War; the latter had a Right to keep two Forts, which they had taken from the Emperor: But however, that the Holy Father prayed the Senate of *Venice*, that they would consent to restore those Places, to avoid giving Occasion for a Rupture between the Emperor and the Holy See, &c. *Hist. Venet.* Lib. I. Fol. 12. *Edit. Venet.* 1551.

2. The *Romans* condemned *Prusias*, King of *Bithynia*, not only to make *Attalus*, King of *Pergamus* amends, but to pay him a Sum of Money, by way of Penalty. APPIAN. *Alexand.* De Bell. Mithridat. (p. 172, 173. *Edit. H. Steph.*)

^a *Chap. 2. of this Book.* said ^a before, from that former Obligation, not only the Goods of the Debtor, but also those of his Subjects by the allowed Law of Nations (as by way of Suretyship) stand engaged; which Law of Nations we look upon to be of another Kind, than that which consists in a bare Impunity, or of which the Use is maintained and authorised only externally, by the Effect of a Sentence, whether just or unjust. For as by our own personal Consent, our Dealer [[*ei qui cum actum est*]] does not only acquire an external Right, but also an internal one; (that <659> is, which he may in Conscience make use of.) So also by a certain general Consent, which virtually comprehends in it, the Consent of each Individual. In which Sense the Law is called ³ *πόλεως συνθήκη κοινή*, *A general Convention of the State*. And it is the more probable, that it was thought proper by Nations, that in such a Case, such a Right might be allowed, because this Law of Nations ⁴ was intended, not only to prevent greater Mischiefs, but also to enable every Person to recover his Due.

II. *But not for the Punishment of another Man's Crime.*

II. But, if the Prince's Debt be penal, I do not see that by the Consent of Nations, such a Right is allowed on his Subjects Goods. For such an Obligation upon another Man's Goods is odious, and therefore not to be extended beyond the manifest Intention of those who authorise it. ¹ Besides, there is no Reason of Utility so weighty, as could have induced Nations to establish in regard to the latter Sort of Debt, what they es-

3. See above, *B. II. Chap. XI. Num. 5.*

4. We have shewn above, *Chap. II. of this Book, § 2. Note 1.* that this is founded upon Reasons independent of this Consent of Nations, which is supposed, but not proved.

II. (1) These Reasons would only prove, that so much Rigour ought not to be used with regard to the Subjects for the latter as the former Sort of Debt. For if there be any just War merely penal, as our Author acknowledges there is, and that in such War, there be no Means of getting Satisfaction for the Offence received, or the Crime committed, without having recourse to the Effects of the Subjects themselves, who have no Share in it, and without keeping those Effects; I see no Reason, why the Subjects in that Case should not answer for the Fact of the State, as well as upon Refusal of what is Due, for Instance, by Virtue of a Treaty. The Reasons, which I have alledged elsewhere, founded upon the Constitution itself of Civil Societies, (*Chap. II. of this Book, § 2. Note 1.*) subsist in this Case in all their Force, and that without having Occasion for a tacit Consent of Nations.

tablished in regard to the former. For that which is due to us on account of any Damage, makes Part of our Goods; but not that which is due to us in form of Punishment; so that the Prosecution of the latter may, without any Damage, be omitted. Neither does what I have already^a mentioned of the *Attic* Law at all contradict it: For in that Case Men stood engaged not strictly because the State could be punished,² but only to force the State to do what it ought to do; that is, to judge the Guilty: Which Obligation founded on a Duty, has Relation to the former Sort of Debt not to the latter. For it is one Thing to be obliged to punish, and another Thing to be liable to Punishment. Tho' this is commonly the Consequence of an Omission about that; but still they are two different Things, since the one is the Cause, and the other the Effect. Therefore the Goods of the Enemies Subjects cannot be acquired under the Notion of Punishment, but only those of Offenders themselves, among whom are included the Magistrates, that do not (according to their Duty) punish Offences.

^a *Ch. 2. § 3. of this Book.*

III. Moreover, the Goods of an Enemy's Subjects may be taken and acquired, not only to reimburse ourselves of the primary Debt, which was the Occasion of the War; but also to make Satisfaction for the subsequent Charges, according to what we have said in the beginning of this Book. And thus we must understand what some Divines have written, that Things taken in War are not to be compensated by the principal

III. *By Debt is here understood the Charges in War. Examples of this.*

2. But even by seizing these Persons, it was supposed at least, that the State might render itself culpable by a Refusal to do Justice, without which it would not have been necessary to have proceeded so far. Besides, when the State had actually refused to punish or deliver up the Murderer, and had thereby rendered itself worthy of Punishment, without doubt the Persons, who had been seized on that Account, were not released: Otherwise to what Purpose would they have been seized? Why then might the Liberty of the Subjects be answerable for the Crime of the State, rather than their Effects? Are the latter dearer to them than the former? It is in vain to say, that the Subjects were only deprived of their Liberty for a Time, that is, till the State had done what it ought. For it might easily happen, that the Prisoners might die before that: And it will be said also, in regard to Goods, that they are seized till the State has made, either out of its own Effects or otherwise, a Satisfaction answerable to the Punishment it deserves.

Debt. For this is to be understood, till, according to sound Judgment, Satisfaction be made for the Damage done in that War. Thus in the Treaty with *Antiochus*, the *Romans* (as *Livy*¹ relates) judged it equitable, that the <660> King should bear the Charges of the War, who by his Fault had been the Occasion of it. So *Justin*² calls it *a reasonable Condition*. The *Samians* are condemned in *Thucydides*,³ *To bear the Charges of the War*. And elsewhere we find a great Number of the like Examples. But whatsoever is justly imposed on the Conquered, may be exacted in a just War.

IV. *Humanity bids us not use this Right to the utmost.*

IV. 1. But we must observe, which we have elsewhere mentioned, that the Rules of Charity reach farther than those of Right. He that abounds in Wealth is guilty of gross Inhumanity, if he strip his poor Debtor of all that ever he is worth, by the Rigour of the Law, to satisfy his own Debt; but more particularly, if that Debtor contracted that Debt by his Kindness to another; as if he had engaged for his Friend, but had received none of the Money to his own proper Use.¹ *Very miserable is the Condition of a Security*, says *Quintilian the Father*. Yet such a hard hearted Creditor acts nothing against Right, properly so called.

III. (1) *Ea, quae Legato magna ad pacem impetrandam videbantur, parva Romanis visa. Nam & impensam, quae in bellum facta esset, omnem praestare Regem aequum censebant; cujus culpa bellum excitatum esset.* Lib. XXXVII. (Cap. XXXV. Num. 8.) POLYBIUS mentions this, *Excerpt. Legat.* XXIII. The People of *Asia* were condemned to the same Thing by *Sylla*, as APPIANUS ALEXANDRINUS relates, *De Bell. Mithridat.* (p. 213. *Edit. H. Steph.*) The King of *Poland* alledges this Custom in his Favour. THUANUS, *Hist.* Lib. LXXIII. upon the Year 1591. The Scholiast of HOMER explaining wherein the Amends demanded by the *Greeks* from the *Trojans* for the Expences of the War consisted, makes it the Moiety of the Riches of the City. In *Iliad.* Lib. III. (Ver. 286.) GROTIUS.

2. *Impenas belli lege justa suscepturus* [Perseus] *Lib. XXXIII. Cap. I. Num. 5.* So our Author cites this Passage, I know not from what Edition: For all that I have seen say without any Variety of Reading whatsoever: *Lege VICTI*. That is to say, according to the Condition generally imposed on the Conquered by the Victor.

3. *Lib. I. Cap. CXVII.* Edit. Oxon.

IV. (1) *Etiam quum istud periculum est Sponsoris, miserabile est: Bonitate labitur, humanitate conturbat.* [Declam. CCLXXIII.] The same Author adds, that the Creditor cannot, with Honesty, sue a Surety, unless there is no Means of recovering the Debt from the Principal himself. *Non enim aliter, salvo pudore, ad Sponsorem, venit*

2. Wherefore² Humanity requires us to spare the Goods of those who are in no Fault concerning the War, and who are no otherwise concerned than by Way of Suretyship, which we may better be without than they; but especially if it appear, that they shall receive no Reparation for them from their own State. Agreeably to this, said *Cyrus* to his Soldiers, at the taking of *Babylon*,³ *What ye get (from your Enemies) is justly your own, but if you leave them any Thing, it will be an Act of Humanity.*

3. This is also to be observed, since this Right of seizing the Goods of innocent Subjects is but Subsidiary, or by Way of Suretyship, as long as there are any Hopes of recovering our own from the principal Debtor, or from those who, by refusing to render Justice, make themselves Debtors, to prosecute those who are wholly innocent, tho' it does not contradict the Rules of strict Justice, yet it is far distant from the Rule of Humanity.

4. Examples of this Humanity are very frequent in History, especially the *Roman*; as when, upon conquering the Enemy, their Lands were returned to them,⁴ upon this Condition, that they should from thence-

Creditor, quam si recipere a Debitore non possit. He has Reason for saying, *salvo pudore*, with Honesty; for as *CICERO* observes, there is a Kind of Shame and Dishonour in suing a Surety. *Esti Sponsores adpellare, videtur habere quamdam, δυσωπίαν.* Lib. XVI. *Epist. ad Attic.* XV. *GROTIUS.*

What our Author observes here is the more proper, as, in *CICERO*'s and *QUINTILIAN*'s Time, the Creditor could chuse whether he would sue the Security or the Principal first. But the Emperor *Justinian* abolished that Permission, and decreed in his *Novel.* IV. *Cap.* I. that the Surety should not be proceeded against, except in Default of the principal Debtor. See the *Julius Paulus* of Mr. *NOODT*, *Chap.* XI. where he cites several Examples of this Kind.

2. *Ptolemy* having gained a Victory over *Demetrius*, the Son of *Antigonus*, sent back his Tent, and the rest of his Baggage, with the Money also which he had taken from him, telling him, that their Dispute was for Empire and Glory, and not for every Kind of Things. This *PLUTARCH* relates, in the Life of *Demetrius*, (p. 891. A. The last Words of which Passage are cited above, in *Chap.* XI. of this Book, § 6. *Num.* 2.) See also what *Sancho* King of *Navarre* did, in *MARIANA*, *Hist.* Lib. XI. *Cap.* XVI. *GROTIUS.*

3. *XENOPHON*, *De Cyri Instit.* Lib. VII. *Cap.* V. § 26. *Edit. Oxon.*

4. *Et TREBATIUS ait agrum, qui hostibus devictis ea conditione concessus sit, ut in civitatem veniret, habere adlucionem, neque esse limitatum, &c.* *Digest, Lib.* XLI. *Tit.* I. *De adquir. rerum Domin.* Leg. XVI. The Lands spoken of in this Passage, were

forth belong to the conquered State. Or when a small Part of those Lands were, for Honour's Sake, ⁵ left to <661> the antient Possessors. Thus *Livy* tells us, that the *Veientes* ⁶ were punished by *Romulus*, with the Loss of part of their Lands only. So *Alexander* the *Macedonian* restored their Lands to the *Uxii* under a Tribute. Thus we often read that surrendered Cities were not pillaged. And we said before, ^a that not only the Persons, but also the Goods of Husbandmen, were by a laudable Custom, and conformable to the Canons, spared, at least with a Tribute laid upon them; and a Liberty of Trade was allowed to Merchants, upon their paying Custom for their Commodities.

^a Chap. 12. of
this Book. § 4.
Num. 3.

not purely and simply restored, but upon Condition of paying a certain Tribute, which was exacted from the Body of the conquered State, and not from every individual; for which Reason the Lands are said to be given to the State. See the Notes of the late Mr. GOES upon the *Auctores Rei Agrariae*, p. 198.

5. *Item si forte ager fuit, &c.* Digest. *Lib. VI. Tit. I. De Rei vindicat.* Leg. XV. § 2. It relates to some private Persons, to whom this Mark of Distinction was given, when the Rest of the Lands were divided amongst the Soldiers. An antient Author speaks of it thus, *Nec tamen omnibus personis victis ablatis sunt agri: Nam quorundam dignitas aut gratia, aut amicitia, victorem ducem movit, ut eis concederat agros suos.* SICULUS FLACCUS, *De conditionib. agror.* p. 16. *Edit. Goes.* See CUJAS, upon the Law here quoted, *Recit. in Digest.* p. 278, 279. *Edit. Fabrott.*

6. APPIANUS ALEXANDRINUS says in general, that the antient *Romans* acted in this Manner, with regard to their conquered Enemies. *De bell. Civil.* Lib. II. (p. 516. *Edit. H. Steph.*) We find in History, that the *Vandals* observed the same Maxim in *Africa*, and the *Goths* in *Italy*. GROTIUS.

Of Moderation concerning Captives.

I. 1. In what Places the taking of Men Prisoners, and making them Slaves, is yet allowed, if we respect internal Justice, it is to be thus limited; that is, it may be so far lawful, till Satisfaction be made for the Debt, either principal, or accessory; unless it should happen, that the Persons taken be guilty of such Crimes as may justly forfeit their Liberty. Hitherto therefore, and no further, he that wages a just War, has a Right over the Subjects of his Enemy taken Prisoners, and a Power to transfer it firmly to others.

I. *How far, in Conscience, we may make Prisoners of War.*

2. But we are taught by Equity and Humanity to put the like Differences, as before ^a observed, when we treated concerning killing our Enemies. *Demosthenes*, in his Epistle for *Lycurgus's* Children, highly commends *Philip of Macedon*, because that he did not make all that were found among his Enemies Slaves. ¹ *For he did not think to use all alike, either just or honest; but duly weighing the Merits of each Person, he acted rather the Judge (than Conqueror).*

^a Chap. II. of this Book, § 4. & seq.

I. (1) (P. 714. *Edit. Basil. 1572.*) *Alexander the Great*, that Prince's Son, when he took the City of *Thebes*, excepted out of the Number of Prisoners that were to be made Slaves, the Priests, and such as had not given their Consent to the publick Ordinances made against him. Which *PLUTARCH* tells us in his *Life*, (p. 670. E.) *GROTIUS*.

II. *What may
be done to
Slaves by the
Right of inter-
nal Justice.*

II. I. But ¹ we must observe again here, that the Right which arises, as it were, ² from Suretyship for a State, is not of so large an Extent, as that which is derived from the personal Offences of those that are made ³ *Slaves of Punishment*, as they are called. Whereupon a certain *Spartan* ⁴ said he was a Prisoner, but not <662> a Slave. For if we rightly consider the Thing, this general Right over Prisoners in a just War, is not greater than that which a Lord hath over those Slaves, who by Reason of Poverty have sold themselves to him; excepting, that the Case of those is far more deplorable, who are brought into this Condition, not by their own

II. (I) There is here, in the Original: *Sed primum notandum est*, &c. In the first Edition this was annexed to *Num.* 2. of the preceding Paragraph; the Author added afterwards what follows, without observing, that he had left a Connection here, which did not agree to what was put between. This I have altered, and take Notice of it, as an Instance of the small Amendments it was necessary to make in several Places, which it would have been too tedious to specify.

2. See the foregoing Chapter, § 1, and 2.

3. *Servi poenae*. A Term of the *Roman Law*, for which this is the Reason and Foundation. It was of old the Privilege of all the *Roman Citizens*, as such, not to be deprived either of their Lives or Liberty, but by their own Consent. The Abuse of this Privilege, having produced great Licentiousness and horrible Disorders, Means were found to elude it by a Fiction of Right. When a *Roman Citizen* had committed a Crime that merited Death, or some other Punishment, amounting to a Privation of Liberty, he was not condemned as a Citizen, but before Condemnation declared to be no longer a Citizen; he was considered as a Slave, and had the Sentence executed upon him accordingly. See the *Probabilia Juris* of Mr. NOODT, *Lib.* III. *Cap.* XII. and the Observations of GRONOVIVS, *Lib.* I. *Cap.* VIII. *p.* 77. & seq.

4. PLUTARCH, *Apophthegm.* [p. 234. C. Vol. II. *Edit. Wech.*] PHILO the Jew, speaking of those who have fallen into the Hands of Pirates, or have been taken by the Enemy, says, that the Laws of Nature, superior to those established amongst Men, declare such Persons free, tho' a Father or a Son are obliged to ransom them: (*Lib. Quod omnis Probus liber*, p. 870. E. *Edit. Paris.*) Thus THEODECTES, an antient Poet, makes *Helen* say,

Θεῶν ἀπ' ἀμφοῖν ἐκγόνον ῥιζωμάτων
Τίς ἂν προσειπεῖν ἀξιώσειεν λάτρω.

*Dared they presume to call a Woman Slave,
On both Sides sprung from Gods ———*

GROTIUS.

These two Verses are preserved in ARISTOTLE, *Politic.* *Lib.* I. *Cap.* VI. But they should be read in the Beginning, Θείων δ' ἀπ', &c. according to the *Paris Edition*, and that of DANIEL HEINSIVS.

proper Fact, but by the Fault of their Governors, ⁵ *It is a dreadful Thing (says Isocrates) to be made a Slave by the Right of War.*

2. This Bondage then is a perpetual Obligation to serve the Master, for a perpetual Maintenance. *Chrysippus's* ⁶ Definition does very well agree with this Sort of Slaves, *A Slave is a perpetual Hireling.* And the Law of the *Hebrews* does directly compare him to a Hireling, who compelled by Necessity, has sold himself for a slave, *Deut.* xv. 18. *Levit.* xxv. 40, 53. and will have his Ransom paid by his Labour, ⁷ just as the Fruits of Land sold, shall redeem it for the antient Owner, *Lev.* xxv. 49, 50.

3. There is then a vast Difference between what may be done to a Slave by the Law of Nations, and what by natural Right. As we have it in the afore-quoted Place of *Seneca*, ⁸ *Tho' it be lawful to do any Thing to a Slave, there is something which the common Right of Animals forbids to be done to the Man.* So in *Philemon*,

⁹ *Κὰν δοῦλος ἦν τις οὐδὲν ἤττον, δέσποτα
Ἀνθρωπος οὗτός ἐστιν ἂν ἄνθρωπος ἦ.*

*What tho' in Servitude, my Master,
He is still a Man as much as ever.*

So *Seneca*, in another Place, ¹⁰ *Are they Slaves? Yet they are Men. Are they Slaves? Yet our Companions. Are they Slaves? Yet our Friends. Are they*

5. *Orat. Plataic.* p. 300. A. *Edit. H. Steph.*

6. *Servus, ut placet CHRYSIPPO, perpetuus mercenarius est. De Benefic. Lib. III. Cap. XXII.*

7. That is to say, no Regard was had to the Years which had elapsed since the Slave had sold himself, because the Slave was deemed to have gained by his Work for his Master's Benefit, the Value of what his Master had given him for that Time: So that no more was reckoned than what the Slave might gain in the Years to come, till the *Sabbatical Year*, or *Jubilee*, which restored Slaves to their Liberty, without their being obliged to pay any Thing. In like Manner as Lands returned to their antient Owners, in the Year of *Jubilee*, if the Person, who had sold his Field, would redeem it before that Time, as he might, the Value of the Produce only for the Years which remained to the *Jubilee*, was reckoned. See the Passages cited in the Text.

8. *Chap. X. of this Book, § 1. Num. 3.*

9. *Apud STOBÆUM, Tit. I. XII.* Some learned Men are for reading *δοῦλος ἦ*, and in the second, *ἂν ἄνθρωπος*, &c.

10. *Servi sunt? Immo homines. Servi sunt? Immo contubernales. Servi sunt? Immo*

Slaves? Yet fellow Slaves. And what we read in *Macrobius*¹¹ has the same Meaning with that of *St. Paul*, Coloss. iv. 1. *Masters, render to your Servants what is just and right, knowing that you yourselves have a Master in Heaven.* And in another Place he advises Masters not to terrify them with Threatnings, for the same Reason before-mentioned; *Because we have also a Master in Heaven, with whom is no Respect of Persons.* Ephes. vi. 9. In the Constitutions attributed to *Clemens Romanus*, we are advised, *Be not too*¹² *severe to thy Man or Woman Slave. Clemens Alexandrinus*¹³ would have us use our Slaves as our second Selves, being Men as well as we; in imitation of that wise *Hebrew*,¹⁴ *If thou hast a Servant, use him as a Brother, for he is such a one as thyself.* <663>

III. *It is not lawful to kill an innocent Slave.*

III. The Power of Life and Death which is ascribed to a Master over his Slave, gives to the former a Sort of domestick¹ Jurisdiction; but yet that Power is to be managed with the same Moderation, as do the publick Magistrates. This was *Seneca's* Meaning, when he said,² *In thy Bondman*

humiles amici. Servi sunt? Immo conservi, si cogitaveris tantumdem in utrosque licere fortunae. Epist. XLVII. init.

11. *Et ut primum de servis loquamur, joco an serio putas, esse hominum genus, quod Dii immortales, nec cura sua, nec providentiâ, dignentur? An forte servos in hominum numero esse non pateris?* Saturn. Lib. I. Cap. XI. The Reader may see the Rest of the Chapter, in which the Author expatiates very much upon this Subject.

12. *Lib. VII. Cap. XIV.* There is the same Thought in the Letter of *St. BARNABAS*, where he says, that he who treats his Slave with Cruelty, shews, in doing so, that he does not fear him who is the God of both. *GROTIUS.*

13. *Paedagog.* Lib. III. Cap. XII. p. 307. *Edit. Oxon. Potter.*

14. The Author of *Ecclesiasticus*, Cap. XXXII.

III. (1) It is not as Master that he has this Power of Life and Death, but as Father of a Family. The reciprocal Engagement, which there is between the Master and the Slave, does not imply this of itself, whether the Slave has sold his Liberty, or has been deprived of it by a Consequence of the Right of War. The perpetual Service, to which the Prisoner of War engages himself, is a sufficient Reward for the Life which the Conqueror spares. The Consent of the Slave, either tacit or express, is necessary to the Master's having a Right of Life and Death over him; and this tacit Consent is presumed with Reason, when the Custom is such, as it took Place formerly, not only in the Independence of the State of Nature, where every Father of a Family was a Kind of Sovereign in his own House; but even in Civil Societies, as long as the Laws left to the Masters this Right over their Slaves.

2. The Passage has been cited already, in *Chap. X.* of this Book, § I. *Note 8.*

consider, not what thou mayest inflict on him with Impunity, but what thou mayest do in Equity and Conscience, which requires that we should be merciful to our Captives and purchased Slaves. And in another Place he says, ³ *What signifies it what Government one is under, if he be under a Supreme?* In which Place he compares the Subject with the Slave, and says, tho' they be under different Titles, yet the ⁴ Authority over them is the same; which is certainly very true, with Respect to this Power of Life and Death, and other Things that resemble it. And again, the same *Seneca*, ⁵ *Our Ancestors reputed every Family a little Commonwealth.* Also *Pliny*, ⁶ *A Man's House is a certain Republick, and as a State to his Slaves.* And *Plutarch* ⁷ tells us, that *Cato* the *Censor* would not punish any of his Slaves; no not for the most heinous Offences, unless he were found guilty by his own fellow Servants. To which agree the Words of *Job*, Chap. xxxi. Ver. 13. and so on.

IV. But as to lesser Punishments, viz. Blows, &c. Equity, and also Clemency is to be shewed to Slaves. ¹ *Thou shalt not oppress him, nor rule over him with Rigour*, says the Divine Law concerning a *Hebrew Slave*, *Lev.* xxv. which, as the Title of *Neighbour* is not now confined to one Nation only, should extend to all Slaves, *Deut.* xv. 12, &c. On which Place thus

IV. Not to punish unmercifully.

3. *Si non dat beneficium Servus Domino; nec Regi quisquam suo, nec Duci suo Miles? Quid enim, interest, qualis quis teneatur imperio, si summo tenetur?* De Benefic. Lib. III. Cap. XVIII.

4. *Nam si servo quominus in nomen, &c.* Ibid.

5. *Et Domum pusillam Rempublicam esse judicaverunt [majores nostri].* Epist. XLVII.

6. *Nam servus respublica quaedam, & quasi civitas, Domus est,* Lib. VIII. Epist. XVI. Num. 2.

7. *Vit. M. Caton.* p. 349. A.

IV. (1) These Words, *Thou shalt not oppress him*, are ill applied. For, in the seventeenth Verse, from which our Author took them, there is, *Thou shalt not oppress one another.* And this does not regard Slaves, but the perpetual Alienation of Lands, which the Legislator forbids, under any Pretext whatsoever. The Author cited *Deuteronomy* in this Place also for *Leviticus*: From whence it appears, that all this was writ hastily in the first Edition, without having ever been corrected in the Revisals of other Editions.

² *Philo, Slaves indeed, as to Fortune are Inferiors, but as to Nature equal with their Masters; and, according to the Law of GOD, the Rule of just is not what comes from Fortune, but what is agreeable to Nature. Wherefore Masters ought not to use the Power they have over their Slaves, to gratify their Pride, Insolence, and Cruelty: For these are not the Signs of a meek and peaceable Spirit, but of a passionate and tyrannical Disposition. Seneca <664> puts the Question, ³ Is it equitable to exercise a more severe and cruel Authority over a Man, than is generally done over Beasts? but a skilful Manager that designs to break a Horse, does not pretend to do it by frequent Blows, for he will be fearful and headstrong, if he be not gently handled. And again, the same Author, ⁴ What can be more foolish, than to practise that brutish Cruelty upon a Man (that is our Slave) which we should be ashamed to do to Cattle, or Dogs? On which Account the Hebrew Law ordered the Master to let his Bondman or Bondwoman go free, ⁵ Not*

2. Θεράπωντες τύχη μὲν ἐλάττονι ——— ἀλλ' ὑπ' ἀκρασίας τὴν ὑπεύθυνον (so it must be read, instead of ἀνεύθυνον) κολαζούσης κατὰ τυραννικὴν δύναμιν. De Legib. Specialib. Lib. II. (p. 728. D. Edit. Paris.) St. CYPRIAN expresses himself very strongly upon this Head; he maintains, that those who exercise so tyrannical an Authority over their Slaves, do not acknowledge GOD for their Lord and Master. *Tamen nisi tibi pro arbitrio tuo serviatur; nisi ad voluntatis obsequium pareatur, imperiosus & nimius servitutis exactor, flagellas, verberas, fame, siti, nuditate, ferro frequenter & carcere, adfligis, & crucias, & non adgnoscis miser Dominum DEUM tuum, quum sic exerces ipse in hominem dominatum.* Ad Demetrian. (p. 188. Edit. Fell. Brem.) See MOSES DE COTZI, *Praecept. Jub.* CXLVII. CLXXV. CLXXVIII. and the *Comparison between the Roman Laws and the Law of MOSES*, Tit. III. PRISCUS, in the *Excerptae Legationes*, where he prefers the Manners of the Romans of his Time to those of the Barbarians, observes, to the Advantage of the former, that they treated their Slaves with much more Humanity. They behave, says he, towards them, as if they were their Fathers or Preceptors. They only chastise them to prevent their doing any Thing dishonest, according to their Notions, and that as if they were their own Children; for they have not a Power of Life and Death over them, as Masters have amongst the *Scythians*. Besides, with the *Romans*, Masters have Power to make their Slaves free, as they often do in different Manners, not only during their Lives, but at their Deaths; that last Will being regarded as a Law. (p. 47. Edit. Hoeschel.) See also the Laws of the *Wisigoths*, Lib. VI. Tit. I. Cap. XII. GROTIUS.

3. *Numquidnam aequum est, &c.* De Clement. Lib. I. Cap. XVI.

4. *Quid enim stultius quam in jumentis & canibus, &c.* Ibid. Cap. XVII.

5. PHILO says, that the Master is hereby punished doubly, as he loses both the Slave's Service, and the Money he gave to purchase it. A third Punishment, adds he, and one still more mortifying than both the former, is the seeing himself compelled

only for the Loss of an Eye, but even if he had struck out a Tooth, Exod. xxi. 26, 27. that is, if there had been no just Cause to correct them.

V. I. But ¹ we are also to enjoin them Labour with Moderation, having a Respect to their Strength and Constitution. To which, among other Things, the *Hebrew* Law pointed in the Institution of the Sabbath, viz. that all might have some Rest from their Labours, *Exod.* xx. 10. xxiii. 12. *Deut.* v. 14. And the Epistle of *C. Pliny* to *Paulinus* begins thus, ² *I see how gently you treat your Servants, wherefore I will more freely confess to you with what Tenderness I use mine:* Always remembering that Expression of *Homer*, *Like a Father he was indulgent to his Slaves*, and this our *Pater-Familias*, the Father of a Family.

V. Not to lay too hard Labour upon them.

2. *Seneca* ³ takes Notice of the Humanity of the Antients, in using that Word, *Do you not observe how careful our Forefathers were to prevent all Occasion of Envy to Masters, and Reproach to Slaves? When they called the Master Pater-Familias, The Father of the Family. And his Slaves Familiars, Domesticks. Dion Prusaensis,* ⁴ describing a good King, says,

to do the greatest Good to a Person whom he hated, and desired perhaps to have Power to distress perpetually. The Slave, on the contrary, is doubly made amends for the Injuries he has suffered, as he not only recovers his Liberty, but is also delivered from the Yoke of so cruel a Master. *De legib. special.* Lib. II. (p. 808. A. B.) GROTIUS.

V. (1) See *Chap. XIV.* of the Letter of the Bishops to King *Lewis*, inserted in *The Capitulary of Charles the Bald.* The *Athenians* treated their Slaves with great Humanity, as *XENOPHON* observes to their Honour, in his Description of the Republick of *Athens.* *SENECA* blames those who work their Slaves too hard, as if they were Beasts of Burden, and not Men. *Alia interim crudelia & inhumania praetereo, quod nec tamquam hominibus quidem, sed tamquam jumentis, abutimur,* &c. *Epist.* XLVII. GROTIUS.

2. *Video quam molliter tuos,* &c. *Lib. V. Epist. XIX.* The Verse of *HOMER* is in the *Odyssey*, *Lib. II. ver. 47. and 234.*

3. *Ne illud quidem videtis,* &c. *Epist. XLVII.* This has been copied by *MACROBIUS*, in the Place already cited, *Saturnal*, *Lib. I. Cap. XI. p. 235. Edit. Gronov.* Our Author observed here in a little Note, that *EPICURUS* called Slaves the Master's *Friends*, and cites *SENECA* to prove it, *Epist. CVII.* But, on the contrary, *Friends* are put there in Opposition to the Slaves he mentions, who had run away. The Passage is in the Beginning of the Letter, where that Opposition immediately appears, though there is otherwise some Corruption in the Text.

4. Δεσπότην δὲ οὐχ ὅπως τῶν ἐλευθέρων, &c.

He is so far from taking a Pleasure in being called Lord and Master of his free Subjects, that he does not willingly receive that Title with Respect to his Slaves. Ulysses declares in Homer, ⁵ That those Slaves whom he found faithful, should be regarded by him as the Brothers of his Son Telemachus. And in Tertullian, ⁶ The Name of Goodness is more glorious than that of Power, and to be called the Father than the Master of a Family. And Hierom, or Paulinus, thus speaks to Celantia, ⁷ So govern and order your Family, that you may seem desirous to be accounted, rather the Mother than the Mistress, and engage your Servants to respect you, rather by Kindness than Severity. And St. Augustine ⁸ makes <665> this Observation, Good Parents formerly so managed their Families, that as to temporal Things the Children had the Advantage of the Servants; but as to Affairs of Religion, there was no Distinction. Whence it came to pass, that every Master was called Pater-Familias, which in Time became so customary, that even severe Masters affected that Title. But they who are true Fathers of Families, do take the same Care of their whole Family, in Regard to the Worship and Service of GOD, as of their own Children.

5. *Odys.* Lib. XXI. ver. 215. & seq.

6. *Sed & gratius nomen, &c.* Apologet. Cap. XXXIII.

7. *Familiam tuam ita rege, &c.* Epist. Vol. I. p. 114. Edit. Basil.

8. *Domestica pax a justis, &c.* De Civit. Dei, Lib. XIX. Cap. XVI. What St. AUSTIN says here of the Motives which Religion supplies, he repeats elsewhere, and remarks, that Slaves, for the same Reason, on the other Side ought to obey their Masters with the greater Alacrity. *Tu Dominis servos non tam conditionis necessitate, quam officii delectatione doces adhaerere. Tu Dominos servis, summi Dei scilicet, communis Domini, consideratione placabiles, & ad consulendum, quam ad coercendum, propensiores facis.* De Moribus Eccles. Catholicae, Lib. I. Cap. XXX. St. CYPRIAN had before laid down as a Maxim, that Masters ought to use their Slaves, when converted to Christianity, with more Favour. *Testimon.* Lib. III. (§ 82. p. 85.) Which he proves by the Passage in the Epistle of St. PAUL to the *Ephesians*, vi. 9. LACTANTIUS, speaking of the Equality of Christians, as such; for which Reason they all call one another *Brethren*; extends that Appellation even to Slaves, who, tho' of a different Condition, in Regard to the Body, are, as to the Mind and Religion, Brothers, even of their Masters; and Servants of one common Lord. *Dicit aliquis: Nonne sunt apud vos alii Pauperes, &c.* Instit. Divin. Lib. V. Cap. XV. See also ISIDORUS, *Pelusiot.* Lib. I. Epist. CCCCLXXI. GROTIUS.

The Passage cited here by our Author, as Saint CYPRIAN's, is only the marginal Summary, which answers to the Citation of the Passage in Saint PAUL.

3. The same Tenderness *Servius*⁹ observes to be in the Word *Children*, by which they meant Slaves, in his Remark upon that of *Virgil*,

Claudite jam rivos Pueri.

And thus did the *Heracleotae* call their Slaves *Mariandyni*,¹⁰ Δωροφό-
πονος, *Carriers of Presents; abating the Harshness of the Name of Slave*, as *Callistratus*, an old Interpreter, observed on *Aristophanes*. *Tacitus*¹¹ com-
mends the *Germans*, who treated their Slaves like Husbandmen. And *Theana*,¹² in an Epistle, says, *The right using of Slaves is not to over-work
with hard Labour, nor enfeeble them for Want of necessary Sustenance.*

VI. I. As I said before, we are obliged to maintain our Slaves for their Work. *Cicero* says,¹ *We are to use Slaves as Mercenaries, by making them do their Work, and paying them their Due.* And in *Aristotle*,² *A Slave's Wages is his Maintenance.* And *Cato* advises,³ *Provide carefully for your Family, that it be not starved with Cold or Hunger. There is something,* says

VI. *The Stock of the Slave, how far the Master's and how far his own.*

9. Our Author gives this as said upon the famous Verse of *VIRGIL*, *Claudite jam rivos, pueri, &c.* Eclog. III. *ver. ult.* But there is nothing like it there. It is on *Eclogue VI.* that *SERVIVS* remarks barely, and without adding any moral Reflection that relates to the present Subject, that *Domesticks* were called *Children*. *Utrum ergo aetate Pueros an ministros & familiares solemus communiter Pueros vocare?* In *ver. 14.*

10. It is *ATHENAEUS* who relates this, *Lib. VI. Cap. XVIII.* But the learned *GRO-NOVIUS* is of Opinion, that the Word Δωροφόροι signifies rather *Donors*, or *Tributaries*, and that their being called so is founded upon the Work which they do, either for their own Masters, or such as hire them, being a Kind of Tribute, which is looked upon as a Present. The grammatical Analogy favours this Explication.

11. *Frumenti modum Dominus, aut pecoris, aut vestis, ut Colono injungit: Et servus hactenus paret.* German. *Cap. XXV. Num. 2.*

12. She says at the same Time, that it is the Means of gaining the Friendship of *Domesticks*, which is not bought with them: And gives for the Reason of the Humanity with which they ought to be treated, what has been mentioned upon this Head more than once, *viz.* that Slaves are Men as well as their Masters. *Fragment. Pythagoreor. in Opusc. Mythologicis, Phys. Ethic. &c.* Amstel. 1688. p. 746, 747.

VI. (1) *Quibus [Servis] non male praecipunt, qui ita jubent uti, ut mercenariis: Operam exigendam, justa praebenda.* De *Offic. Lib. I. Cap. XIII.*

2. *Oeconomic. Lib. I. Cap. V.*

3. *Familiae male ne sit, ne algeat, ne esuriat.* De *Re Rustic. Cap. V.*

Seneca,⁴ that a Master owes to his Servant, viz. Food and Raiment. *Donatus*⁵ writes, that a Slave was allowed four Bushels of Corn every Month, for his Maintenance. And *Martianus* the Lawyer informs us, that a Master is obliged to provide his Slave⁶ Cloaths, and the like.⁷ The *Sicilians* are blamed in Histories for cruelly starving the *Athenian* Prisoners. <666>

2. *Seneca*⁸ also, in the fore-mentioned Place, proves, that in Regard to certain Things a Slave has the same Rights as if he were free, and that he may even become a Benefactor to his Master, by doing for him something beyond the Services he owes him, provided he therein Acts, not through Fear and Constraint, but of his own free Will, and out of Affection; which the Philosopher explains at large. So likewise, if a Slave, (as it is in⁹ *Terence*) save any Thing out of his own Belly, or earned ought in his spare Hours, that properly is his own. *Theophylus* justly defines

4. *Est aliquid, quod Dominus praestare servo debeat, ut cibaria, ut vestiarium.* De Benefic. Lib. III. (Cap. XXI.) *Familia vestiarium petit victumque.* De Tranquill. Anim. (Cap. VIII.) The *Romans*, besieged by the *Goths*, and pressed by Famine, told *Bessas* and *Conon*, who commanded the Army of the Besiegers, "If you would have us surrender ourselves as Prisoners of War, give us Provisions, if not so much as we stand in need of, at least enough to keep us from starving." *PROCOPIUS*, *Gothic.* Lib. III. (Cap. XVII.) *St. CHRYSOSTOM* considers the Obligation of Masters to provide his Slaves with Food and Cloaths, as a Kind of Servitude; because, if he does not discharge that Engagement, the Slaves are discharged from theirs, and no Law, in such Cases, can compel them to serve. In *Eph.* v. 2. *GROTIUS*.

5. *Servi quaternos modios accipiebant frumenti in mensem, & id Demensum dicebatur.* In *TERENT. Phormion.* Act. I. Scen. I. ver. 10.

6. Those Things, for that Reason, were not deemed to be a Part of the Slaves *peculium*, which belonged to his Master, tho' the Slave possessed it as distinct Effects, *Si vero tunicas, aut aliquid simile, quod ei Dominus necesse habet praestare, non esse peculium.* Digest, Lib. XV. Tit. I. *De Peculio*, Leg. XL.

7. The Cruelty of the Emperor *Isaacus Angelus* to the *Sicilians*, whom he had made Prisoners of War, is also censured by *NICETAS*, who recites a Letter writ by the King of *Sicily* to the Emperor, upon that Subject. *Vit. Isaac. Ang.* Lib. I. Cap. III. *GROTIUS*.

8. *Et eo perducam servum, &c.* De Benefic. Lib. III. Cap. XIX. and XXI.

9. *Quod ille unciatim vix de demenso suo
Suum defraudens genium, comparisit miser.*

Phorm. Act. I. Scen. I. ver. 9, 10.

the *Peculium*, οὐσίαν φυσικῆν,¹⁰ a natural Patrimony, as if you should call the Copulation of Slaves¹¹ a natural Marriage. *Ulpian* expressly calls the *Peculium* a small Patrimony.¹² Nor does it import much, that his Master may, at his own Pleasure, take it away, or diminish it; for if he does it without Cause he will act unjustly. By a Cause I mean, either by way of Punishment, or for his Lord's Necessity. For the Interest of the Slave ought to give Place to that of the Master, even more than the particular Interest of Subjects to the Interest of the State. Agreeable to this

10. *Institut.* Lib. IV. Tit. VII. *Quod cum eo qui in al. pot. &c.* § 4. *HOMER* makes *Eumaeus* say, that if *Ulysses* had returned to his House, he would have given him a House, an Inheritance, a desirable Wife, in a Word, every Thing that a good Master could give a faithful and affectionate Domestick.

“Ὅς κεν’ ἐμ’ ἐνδυκέως, &c.

Odys. Lib. XIV. (ver. 62. & seq.) *Ulysses* himself makes a like Promise to *Eumaeus*, and the other Shepherd *Philoetius*, Lib. XXI. (ver. 214, 215.) *VARRO* advises Masters to treat their Slaves with Humanity, to supply them plentifully with Food and Raiment, to give them Relaxation from Labour, and suffer them to feed some Cattle of their *peculium*, in their Grounds, in Order to encourage them to work with the more Zeal. *Studiosiores ad opus fieri, &c.* (De Re Rustic. Lib. I. Cap. XVII.) *GROTIUS*.

The learned Civilian *FRANCIS HOTMAN* observes, that the Word *Peculium* is derived from the Custom of giving Slaves some Herd to feed, as their own Property, Riches consisting at first in Cattle. And he cites upon it, (*Comm. in Tit. Digest, De Pecul.* § 2.) this other Passage of *VARRO*. *Tu, inquit, tibicen non solum adimis Domino pecus, sed etiam Servis Peculium, quibus Domini, dant ut pascant, &c.* De Re Rustic. Lib. I. Cap. II.

11. See above, B. I. Chap. III. § 4. Num. I.

12. *Peculium dictum est, quasi pusilla pecunia, seu patrimonium pusillum.* Digest, Lib. XV. Tit. I. De pecul. Leg. V. § 1. Very well: But this Patrimony, according to the Principles of the Roman Law, did not cease to belong entirely to the Master. (*Institut.* Lib. II. Tit. XII. *Quibus non est permillum facere Testament.* princ.) The Slave did not possess it by a civil Right. *Et Peculium, quod Servus civiliter, quidem possidere non posset, sed naturaliter tenet, Dominus creditur possidere.* Digest, Lib. XLI. Tit. II. De acquir. vel amitt. Possessione, Leg. XXIV. And he might make himself guilty of Theft, in Regard to his own Stock: *Quum autem Servus rem suam peculiarem, furandi consilio amovet—Si alii tradiderit, furtum faciet*, Lib. XLVII. Tit. II. De Furtis, Leg. LVI. § 3. All Acquisitions came also to the Master, *Instit.* Lib. II. Tit. IX. *Per quas personas nobis acquiritur*, § 1, 3. So that a Slave is only improperly said sometimes to have a Kind of Patrimony. See the great *CUJAS*, in his Work *Ad Africanum*, Tractat. II. upon Law CVII. § 1. Digest, De Legat. I. Our Author seems here to have had that Passage in View. See also *LAURENTIUS PIGNORIUS*, De servis, p. 4. Edit. Patav. 1656.

is that of *Seneca*,¹³ *It does not therefore follow that a Slave has nothing, because he cannot enjoy it unless his Lord pleases.*

3. Hence it is, that the Master cannot demand again any Debt due to his Slave, in the Time of his Slavery, which he pays him after his Release. Because (as *Tryphoninus*¹⁴ says) in a personal Action, the Consideration of a Debt, or no Debt, is understood naturally. And the Master may possibly be a Debtor naturally to his Slave. Therefore, as we read that^a Clients have contributed something to the Use of their Patrons, and Subjects to the Use of Princes, so have Slaves¹⁵ to the Use of <667>

^a *Dion. Halic. Antiq. Rom. l. 2. c. 10.*

13. He had just said, that tho' the *Peculium* and Person itself of the Slave, belonged to the Master, the Slave, however, might make his Master a Present, *Num quid dubium est, &c.* De Benefic. Lib. VII. Cap. IV.

14. *Si quod Dominus servo, &c.* Digest. Lib. XII. Tit. VII. De conditione indebit. Leg. LXIV.

15. The Example of Contributions for the Portion of a Daughter, or the Ransom of a Son taken Prisoner, is indeed confirmed in Regard to Clients, by the Authority of DIONYSIUS HALICARNASENSIS, in the Place quoted in the Margin: But in Relation to Slaves, I am very much mistaken if our Author had any other Authority than what we read in the Scene of a Comedy in TERENCE, from which he has cited something before, *Note 9.* We there see a Slave makes a Present to the Bride his Master's Son had married, out of his Savings. He that speaks, who is himself a Slave, believes, that his Friend will be obliged to do as much when his Mistress shall be brought to bed, on the Child's Birth-Day, and that of his being initiated in certain Mysteries.

*Nam herilem filum ejus duxisse audio
Uxorem: Ei, credo, munus hoc conraditur.*
* * * * *

———— *Porro autem Geta*

*Ferietur alio munere, ubi hera pepererit:
Porro autem alio, ubi erit puero natalis dies,
Ubi initiabunt, &c.*

Phormio, *Act. I. Scen. I. ver. 5, 6, 12. & seq.* For the Rest, I am surprized that our Author forgot one Thing in this Place, which makes very much for his Subject; that is, that amongst the *Romans*, a Slave might ransom himself by an Agreement with his Master, to whom he gave, as the Price of his Liberty, either what he had laid up by his Savings, or received from the Liberality of others, or got in any other Manner. This Custom was introduced early, as *SENECA* not only speaks of it, (*Peculium suum, quod compararunt ventre fraudato, pro capite numerant, &c.* Epist. LXXX.) but there are also Proofs of it in *PLAUTUS*, (*Aulul. Act. V. ver. 8, 9. Casin. Act. II. Scen. V. ver. 6. & seq. Rudent. Act. IV. Scen. II. ver. 23, 24.*) The Emperors *Marcus Antoninus* and *Verus*, confirmed afterwards the Validity of such a Convention, in giving the

their Masters. As if a Daughter were to be portioned out, or a Son to be ransomed, or something like it should happen. *Pliny*,¹⁶ as he himself relates in his Epistles, allowed his Slaves the Privilege of making a Sort of Will, that is so far as to distribute, to give, or bequeath within the Family. Among some Nations we read, that even a fuller Right of acquiring Things was allowed to Slaves, as we have before^b explained, that there are different Degrees of Servitude.

^b *B. ii. ch. 5.*
§ 30.

4. And even the Laws among many Nations have reduced the external Right of Masters unto this internal Justice, of which we are now treating. For among the *Greeks* it was lawful for Slaves, if they were hard used,¹⁷ *To demand that they might be sold.* And at *Rome*,¹⁸ to fly to the Statues (for Refuge) or implore the Assistance of the Governors of Provinces, in Case of Cruelty, Hunger, or intolerable Wrongs. But a Master is not obliged in Rigour to make his Slave free, after a long Service, or a Service whereby the Slave has done for him something of great Importance. If then he grants him his Liberty it is a Favour; tho' this Favour may be sometimes due by the Laws of Humanity and Beneficence. After that Bondage, says¹⁹ *Ulpian*, prevailed by the Law of Nations, the Ben-

Slave Power to complain juridically, and obliging the Master to infranchise him; in Default of which the Slave was declared free, as appears by the *Digest*, Lib. V. Tit. I. *De judiciis*, Leg. LIII. and LXVII. Lib. XL. Tit. I. *De manumissionibus*, Leg. IV. V. &c. See JACOBUS RAEVARDUS, *In divers. Reg. Juris*, Leg. XVI. (p. 174. & seq. *Edit. Wechel.* 1622.) JUSTUS LIPSIUS, upon TACITUS, *Annal.* Lib. XIV. Cap. XLII. CUJAS, *Recit. in Digest.* Vol. IV. Opp. *Edit. Fabrott.* p. 164. and the President BRISSON, *De Formulis*, Lib. VI. p. 559.

16. *Alterum, quum permitto, &c.* Lib. VIII. Ep. XVI.

17. See POLLUX, *Lib.* VII. § 13. and the Commentators upon it.

18. *Nam Antoninus consultus a quibusdam Praesidibus provinciarum de his servis qui ad Aedem sacram, vel ad statuam principum confugiunt, praecipit, ut si intolerabilis videatur saevitia Dominorum, cogantur servos suos bonis conditionibus vendere.—Sed & Dominorum interest, ut auxilium contra saevitiam, vel famem, vel intolerabilem injuriam, denegetur iis, qui juste deprecantur. Ideoque cognosce de querelis eorum, &c.* *Institit.* Lib. I. Tit. VIII. *De his qui sui vel alieni juris*, § 2.

19. *Sed postea quam Jure Gentium Servitus invasit, sequutum est beneficium manumissionis.* *Digest*, Lib. I. Tit. I. *De Justit. & Jure*, Leg. IV.

efit of Release likewise was allowed. We have an Example of this in *Terence*,²⁰ <668>

*Feci è servo ut esses Libertus mihi,
Propterea quod serviebas liberaliter.*

*When you were my Slave, I freed you,
Because you serv'd me with Integrity.*

*Salvian*²¹ declares that it was daily practised, that Slaves, tho' none of the best, yet if they were not arrant Knaves, were presented with Liberty. And he adds, they were allowed to carry away what they had got in the Time of their Service; of which Generosity in Masters we have many Examples in the Martyrologies. And here I must commend the Lenity

20. (*Andr. Act. I. Scen. I. ver. 10, 11.*) I read *servibas* in these Verses, after the Manuscripts, and not *serviebas*. VARRO informs us, that in *Feronia's* Grove the *Romans* used to say to their Slaves, *Let those who have deserved well, sit down Slaves and rise up Freedmen*. It was customary in some Places to give Slaves their Liberty, when they had earned eight Times as much as they had cost their Masters. GROTIUS.

What our Author observes here upon VARRO's Authority, he certainly had from SERVIUS: But that Grammarian says it of his own Head, in speaking of the Goddess *Feronia's* Temple at *Terracina*: For she was the Goddess of Freedmen, and there was there a Stone Seat, where the Slaves were made to sit down, when the Cap was given them, as a Sign of their being made free. The Words in Question were cut on this Seat. *Haec etiam [Feronia] Libertorum Dea est, in cujus Templo raso capite pileum accipiebant. — In hujus Templo Tarracinae sedile lapideum fuit, in quo hic versus incisus erat: BENE MERITI SERVI SEDEANT: SURGANT LIBERI.* In *Aeneid*, VIII. ver. 564. Our Author's Mistake arose, from the Commentator's giving VARRO's Etymology of the Name of the Goddess, immediately after the Passage cited. *Quam VARRO libertatem [libertatis should be read] Deam dicit Feroniam quasi Fidoniam.* The Reader may see further, concerning this Goddess, the Notes of TORRENTIUS upon HORACE, *Lib. I. Sat. V. ver. 24.* The learned JAMES GODEFROY, proves from the Passage of SERVIUS, and other Authorities, that amongst the antient *Greeks* and *Romans*, the freeing of Slaves was often performed in the Temples consecrated to the false Divinities, and that it was from this Custom the Emperor CONSTANTINE took the Manner of enfranchising in Churches, which he established by a Constitution, come down to us. But this great Civilian, (in *Cod. Theodos. IV. 7. De Manum, in Eccl. L. unic. p. 355. Vol. 1.*) quotes PLUTARCH, in the Life of *Publicola*, where I can find nothing that makes for the Subject. And in the Citation from LIVY, *Lib. II.* is quoted probably for *Lib. XXII. Cap. I.* towards the End. Which may be observed by the Way.

21. *In usu siquidem quotidiano, &c.* Ad *Eccles. Catholic. Lib. III. p. 413. Edit. Paris. 1645.*

of the *Hebrew* Law, *Deut.* xv. 13. which absolutely commands, that a *Hebrew* Slave having served out such a certain Time, shall be set free; ²² and that he should not go away empty; the Contempt of which Law the Prophets grievously complain of. *Plutarch* ²³ blames *Cato* the Elder, that he sold his Slaves when they were old, forgetting the common Nature of Mankind.

VII. Here arises a Question, whether it be lawful for a Captive taken in a just War to flee away; I do not mean him who for some personal Fault had deserved that Punishment, but who, by the Fact of the State, has fallen into that Misfortune. According to the most reasonable Opinion he ought not, because, as we have said elsewhere, he is engaged, as a Member of the State, and in its Name, by Vertue of the ¹ general Convention among Nations; which yet is so to be understood, unless an intolerable Cruelty has forced him to it. You may see the Answer of *Gregory Neocaesariensis* concerning this Affair. ^a

VII. *If Slaves may run away.*

^a *Respons.* 16.

VIII. I. We have ^a in another Place debated the Question, whether, and how far, the Children of Slaves are engaged to the Master by internal Right, which, on the Account of the particular Relation it has to Prisoners taken in War, ought not here to be omitted. If the Parents for their own personal Crimes have deserved Death, their Children, for the saving of their Lives, are obliged to serve, because otherwise they had not been born. For Parents have a Power to sell their own Children for Bondslaves, when they are not able to maintain them, as we have remarked in the same Place. Such a Right did GOD himself give to the *Hebrews*, over the Posterity of the *Canaanites*, (*Deut.* xx. 14.)

VIII. *Whether they that are born of Slaves are obliged to the Master, and how far?*

^a *See B.* ii. ch. 5. § 29.

22. Custom interpreted this Law, so that no less than thirty Shekels ought to be given. See the Rabbi MOSES DE COTZI, *Praecept. Jubent.* LXXXIV. GROTIUS.

23. *In Vit. M. Caton.* p. 338, 339. See what follows, where the Reflection is extended, even to Beasts.

VII. (1) Or rather by Vertue of the Convention, express or tacit, which he has made with the Conqueror, for sparing his Life. See what I have said above, *Chap.* VII. of this Book, § 6. *Note* 2.

2. But for the Debt of a State, Children already born, as being Members of that State, may be obliged, no less than the Parents themselves. But this Reason cannot hold for those that are yet unborn, but some other is required; as the express Consent of the Parents, joined to the Impossibility of having otherwise wherewithal to keep the Children that are born to them, on which Account they are even authorised to render them Slaves for ever. There may be also a tacit Convention between them and their Master, grounded on the Master's finding Victuals for the Children that are born: But in that Case they engage the Liberty of their Children only till the latter have, by their own Labour, satisfied for those Expences. If any Right beyond this be allowed to the Master over them, it seems to be granted by the Civil Laws, which sometimes give to Masters more than Equity permits.

IX. *What may be done where the Bondage of Captives is not in Use.*

IX. 1. Among those Nations where this Right of Bondage over Captives is not practised, the best Way will be to exchange Prisoners; and, next to that, to release them for a moderate Ransom. Neither can one positively rate the Sum. But common Humanity teaches us, that it should not be so extravagant, as not to leave the ransomed Person the Necessaries of Life. For the Civil Law allows this even to those, who, by their personal Act, are fallen into Debt. In some Places the Price is determined by Cartels, or regulated by Custom, as formerly among the *Greeks*, the Ransom was a ¹ Mina, and in our <669> Days a ² Month's Pay. *Plutarch*

IX. (1) That is to say, about ten Crowns of *French* Money. Our Author has probably taken this from ARISTOTLE, who however does not ascribe this Custom to the *Greeks*; he gives it only as an Example of Things arbitrary in themselves, which are regulated in a certain Manner, by the Laws and Customs of States, but does not say amongst which it was established. *Ethic. Nicomach.* Lib. V. Cap. X. And that the Ransom of a Prisoner of War was not fixed at a *Mina*, according to the Custom of the *Greeks*, I find a clear Proof in DEMOSTHENES. For, in speaking of some *Greeks* taken by *Philip* of *Macedon*, he says, that one of those Prisoners borrowed for his Ransom *three*, another *five*, *Minae*, and others more or less, according as their Ransom was rated. *Orat. de male obit. legation.* p. 222. A. Edit. Basil. 1572.

2. In the War made by the *French* against the *Spaniards* in *Italy*, the Ransom of an Horseman was a fourth Part of his Year's Pay, but the Captains, and other superior Officers, and Prisoners taken in a Battle, or a Siege, were not included in this Rate. This MARIANA tells us, *Lib. XXVII. Cap. XVIII.* GROTIUS.

³ tells us, that the Wars between the *Corinthians* and *Megarenses*, were waged *mildly, and as became Kinsmen*. If any one were taken Prisoner, he was entertained by his Captor as a Guest, and, upon his bare Word for paying his Ransom, he was sent Home: Whence came the Name of *δορυξένος, a War Guest*.

2. But more heroick is that of *Pyrrhus*, highly applauded by *Cicero*.⁴

*Nec mi aurum posco, nec mi pretium dederitis,
Ferro, non auro vitam cernamus utrique.
Quorum virtuti belli fortuna pepercit,
Eorundem Libertati me parcere certum est.*

*No Gold I seek, no Ransom shall you pay.
The Sword alone our Difference shall decide:
But those whose Valour the Lot of War respects,
I am resolved their Liberty to spare.*

No Doubt *Pyrrhus* thought his War just, yet looked upon himself obliged to restore them their Liberty, whom plausible Reasons had engaged against him. *Xenophon* commends the like Act in *Cyrus*. And *Polybius*, that of *Philip the Macedonian*, after his Victory at *Cheronea*. *Curtius*, that of *Alexander* to the *Scythians*: And *Plutarch* observes, of King *Ptolemey* and *Demetrius*, that they strove who should prevail in Civility to the Prisoners, as much as in Battle. And *Dromichaetes*, King of the *Getes*,^a having taken *Lysimachus* Prisoner, entertained him as his Guest, and thereby engaged him, being an Eye-Witness of both the Poverty and Civility of the *Getes*, ever after to desire such People for his Friends, rather than Enemies.

^a *Strabo*, l. 7.

3. *Quaest. Graec.* p. 295. B. Vol. II. *Edit. Wechel.*

4. (*De Offic.* Lib. I. Cap. XII.) *Tiberius*, the Christian Emperor, acted with the like Generosity in Regard to the *Persians*; and *MENANDER the Protector* praises him for it, (*Cap. XVII, p. 141. Edit. Hoeschel.*) *MARIANA* praises *Sisebutus* for the same Conduct, (*Lib. VI. Cap. III.*) as also *Sancho* King of *Castile: De rebus Hispanic.* Lib. XI. (*Cap. V.*) *GROTIUS*.

Moderation in obtaining Empire.

I. *How far internal Justice allows the gaining of Empire.*

I. If there be some Rules of Equity which we cannot dispense with, and some Acts of Humanity which we laudably exercise towards private Persons, tho' not bound to it in Rigour, we are so much more obliged to observe the former, and it is so much more commendable to practise the latter, towards a whole Nation, or part of one, as the Injury done to a great Number of People is more enormous, and the good done to a Multitude is more considerable, than that which we do to a single Person. As other Things may be obtained in a just War, so the Right of <670> the Sovereign over a People, and the Right which the People themselves have, in Regard to the Sovereignty, may be acquired; but only so far as the Degree of the Punishment due to their Crimes, or the Value of any other Debt, may justify. To which we may also add, the Necessity to avoid some extraordinary Danger. But this last Reason is for the most part joined with the other two, which yet, either in making Peace, or in managing a Victory, is chiefly to be considered. For in other Cases we may abate of our Right, from a Principle of Goodness and Indulgence, but in a publick Danger it is a cruel Compassion to trust too much to a conquered Enemy. Thus *Isocrates* addresses *Philip*, ¹ *It will be necessary for you so far to subdue the Barbarians, as to secure your own Country from all Danger.*

I. (1) *Epist. II. Ad Philip.* p. 409. *Edit. H. Steph.*

II. I. *Sallust*¹ records of the antient *Romans, Our Ancestors, the most religious of all Men, took nothing from the Vanquished, but the Power to hurt.* A Reflection well worthy of a Christian: And to this Purpose he tells us in another Place,² *Wise Men make War for the Sake of Peace, and undergo Labour in Hopes of Rest.* Aristotle often said,³ *The Design of War is Peace, and Rest of Labour.* And this is the Meaning of *Cicero's* excellent Saying,⁴ *War should be undertaken for no other Reason but to procure a firm Peace.* And the same Author again, *Wars are to be undertaken for this End, that we may live securely in Peace.*

II. *To forbear this Right over the Conquered is commendable.*

2. Agreeably to this our Christian Divines teach us, that the End of War is to remove those Things which disturb Peace. Before the Days of *Ninus*, as we have before observed out of *Trogus*,⁵ the Custom was rather to defend the Bounds of a State, than to enlarge⁶ them. Every one's Dominion was limited within his own Country. Kings did not seek for Empire to themselves, but Glory to their People; and contenting themselves with the Victory, would not rule over the Conquered. To which State *St. Augustin* would reduce us, if possibly he could.⁷ *Let them consider,* says he, *that it does not belong to good Men to endeavour at the enlarging their Dominion:* To which he adds, *It is a greater Happiness to have a peaceable Neighbour, than to subdue an ill one in War.* And the Prophet

II. (i) *Neque victis quidquam, praeter injuriae licentiam, eripiebant,* [nostrimajores, religiosissimi mortales] *Bell. Catilinar. Cap. XII. Edit. Wass.*

2. *Postremo sapientes, paucis causa bellum gerunt, laborem spe otii sustentant.* *Orat. I. ad Caesar. De Reb. ordinand. Cap. XL.*

3. *Politic. Lib. VII. Cap. XV.* See also the foregoing Chapter, and *Ethic. ad Nichom. Lib. X. Cap. VII.*

4. *Bellum autem ita suscipiatur, ut nihil aliud, nisi pax quaesita videatur,* *De Offic. Lib. I. Cap. XXIII.*

5. *Fines imperii tueri, magis quam proferre, &c.* *JUSTIN, Lib. I. Cap. I. Num. 3, 4.*

6. The Emperor *Alexander* told *Artaxerxes* King of *Persia*, that every Prince ought to be contented with his own Possession, and not undertake a great War, for the Sake of extending his Frontiers. *GROTIUS.*

This Passage is in *HERODIAN, Hist. Lib. VI. Cap. II. Num. 9. Edit. Boecler.* I see no Reason for our Author's having put in the Beginning of it, *ἐν τοῖς ἰδίοις ὄροις*, instead of *ἐν τοῖς τῶν ἰδίων ὄροις*. The Correction is not at all necessary, admitting our Author had believed the Reading faulty.

7. [[There is no footnote associated with this number in the original. In the Latin text it is "De Civ. Dei, lib. IV, 15."]]

Amos, (Chap. i. ver. 23.) highly blames the *Ammonites*, for their eager desire to enlarge their Borders, by encroaching on their Neighbours.

III. *Either by mixing the Conquered with Conquerors.*

III. The prudent Moderation of the old *Romans* comes very near to this exemplary Innocence of the primitive Times. ¹ *What would our Empire now have been?* (says *Seneca*) *if a sound Policy had not intermixed the Conquered with the Conquerors.* Our Founder *Romulus*, (says *Claudius*, ² in *Tacitus*) *was so wise, that he made those that were his Enemies, the same Day Citizens;* and he tells us, ³ *That nothing so much contributed to the Ruin of the Lacedemonians and Athenians, as their excluding the Conquered as Strangers from the common Rights of their Citizens.* *Livy* ⁴ says, the *Roman Republick* was aggrandized, by giving the Freedom of Citizens to its Enemies, after they were conquered. Histories give us the Examples of the *Sabins*, *Albans*, *Latins*, and other *Italian Nations*; till at last, *Caesar led the Gauls* ⁵ <671> *in Triumph, and then introduced them into the Senate.* *Cerealis*, in *Tacitus*, ⁶ thus addresses the *Gauls*, *You yourselves generally command our Legions, you govern these, and the other Provinces; you are denied or debarred nothing:* And he adds, *Wherefore love Peace, and reverence a City where you enjoy the same Right as the Conqueror.* Lastly, what is very admirable, all within the Compass of the *Roman Empire*, by the Decree of the Emperor *Antoninus*, ⁷ were made Citizens

III. (1) *Quid hodie esset imperium, nisi salubris providentia victos permiscuisset victoribus?* De *Ira*, Lib. II. Cap. XXXIV.

2. *At Conditor noster Romulus tantum sapientia valuit, ut plerosque populos eodem die hostes, dein cives, habuerit.* Annal. Lib. XI. Cap. XXIV. Num. 7.

3. *Quid aliud exitio Lacedaemoniis & Atheniensibus, quamquam armis pollerent, nisi quod victos pro alienigenis arcerent?* Ibid. Num. 6.

4. *Vultis, exemplo majorum, augere Rem Romanam, victos in civitatem accipiendo?* Lib. VIII. Cap. XIII. Num. 16.

5. *Gallos Caesar in triumphum ducit, idem in Curiam.* This is a Kind of a Song, made by Persons discontented with the Government, as *SUETONIUS* informs us, in the Life of *Julius Caesar*, Cap. LXXX. from which our Author took this Verse.

6. *Ipsi plerumque Legionibus nostris praesidetes: Ipsi has aliasque provincias regitis. Nihil separatum clausumve.* Hist. Lib. IV. Cap. LXXIV. Num. 3.

7. *In Orbe Romano qui sunt, ex Constitutione Imperatoris Antonini, cives Romani effecti sunt.* Digest. Lib. I. Tit. V. De *Statu Hominum*, Leg. XVII. This was the Emperor *Caracalla*, and not *Antoninus Pius*, as is said in *Novell.* LXXVIII. of *JUSTINIAN*,

of *Rome*, which are the very Words of *Ulpian*. After that, as *Modestinus*⁸ observes, *Rome* was the common Country of all that were under its Dominion. And thus said *Claudian* of it,

⁹ *Hujus pacificis debemus moribus omnes,
Quod cuncti gens una sumus.*
*We owe this Union of so many States
To her pacific Maxims.*

IV. 1. There is another Kind of Moderation in Victory, to leave to the Conquered, either Kings or People, their own Government. Thus *Hercules* to *Priam*,

¹ *Hostis parvi victus lacrymis,
Suscipe, dixit, Rector habenas,
Patrioque sede celsus solio,
Sed sceptrâ fide meliore tene.*
*Won by the Tears of a disabled Enemy,
Once more (says he) receive the Reins of Empire,
Fill once again, the Throne of your Progenitors;
But keep your Faith with more Integrity.*

IV. Or by leaving the Sovereignty in the Hands of those that possessed it before.

The same *Hercules* having conquered *Neleus*, gave his Kingdom to his Son *Nestor*. Thus the *Persian* Monarchs left their Kingdoms to the con-

Cap. V. nor *Marcus Antoninus*, to whom *AURELIUS VICTOR* attributes the Constitution in Question, *De Caesaribus*, Cap. XV. Num. 13. upon whose Authority *GROTIUS* seems to determine in Favour of the latter Emperor, in his *Sparsiones Florum ad Jus Justinian*, p. 75. *Edit. Amstel.* Neither was it from a Motive of Moderation, or good Policy, that *Caracalla* made all the Subjects of the Empire, who were Freemen, Citizens of *Rome*; but to encrease his Finances, by multiplying the Profits and Echeats, which he derived only from *Roman* Citizens, upon Occasion of several Things that Strangers had no Share in. This the Learned have long ago observed, chiefly from the express Words of *DION CASSIUS*, *Excerpt. Peiresc.* p. 744. And after them the late Baron *SPANHEIM* has exhausted the Subject, in his excellent Work, intitled *Orbis Romanus*, Dissert. II. Cap. I. & seq.

8. *Roma communis nostra patria, &c.* Digest, *Lib. L. Tit. I. Ad Municipalem, &c.* Leg. XXXIII.

9. *In secundum Consulat. Stilichon.* ver. 154, 159.

IV. (1) *Troad.* ver. 725. & seq.

quered Kings. So did *Cyrus* to the King of *Armenia*, and *Alexander* to *Porus*. This ² *Seneca* much commends, *To take nothing from the vanquished King but Honour*. And *Polybius* ³ admires the Moderation of *Antigonus*, that when he had *Sparta* in his Power, he left to the Citizens, *Their antient Government and Liberty*. Which Act, he says, acquired him great Praise throughout *Greece*.

2. Thus the *Cappadocians* were permitted by the *Romans* to use what Form of Government they pleased; and several other Nations, after the War, were left free. <672> *Carthage* ⁴ was left free, to be governed by her own Laws, as the *Rhodians* pleaded to the *Romans*, after the second Punic War; and *Pompey*, (says ⁵ *Appian*) *Of the conquered Nations he left some free*. And *Quintius* answered the *Aetolians*, crying out that there could be no firm Peace, till *Philip* the *Macedonian* were driven out of his Kingdom; ⁶ they had perfectly forgot the Custom of the *Romans*, to spare those they had conquered; adding this, *That a great Soul was always the most merciful to the Vanquished*. And *Tacitus* informs us, ⁷ *That nothing was taken away from Zorsines when he was conquered*. ⁸

2. *Si vero regnum quoque suum tuto relinqui apud eum potuit, reponique eo unde deciderat: Ingenti incremento surgit laus ejus, qui contentus fuit, ex Rege victo nihil, praeter gloriam, sumere*. De *Clement. Lib. I. Cap. XXI*. The whole Passage is well worthy of being read: Especially what follows immediately, where the Philosopher says, that to act so is to triumph over Victory itself, and to shew, in the most evident Manner, that the Victor found nothing amongst the Vanquished worthy of him. *Hoc est etiam ex victoria sua triumphare, testarique, nihil se, quod dignum esset victore, apud victos invenisse*. *Pompey the Great* left *Tigranes*, King of *Armenia*, Part of his Dominions, as *EUTROPIUS* informs us, *Breviar. Hist. Roman. Lib. VI. Cap. X. GROTIUS*.

3. *Lib. V. Cap. IX*.

4. This the *Embassadors* of *Rhodes* said to the *Roman Senate*, *Ne alios populos enumerem, Carthago libera cum suis legibus est*. *LIVY, Lib. XXXVI. Cap. LIV. Num. 25*. See what is remarked upon this Liberty, left by the *Romans* to conquered Kings and States, *Book I. Chap. III. § 21. Note 21*.

5. *Bell. Mithridat.* (p. 251. *Edit. H. Steph.*) To understand the Condition of those free States read *POLYBIUS, Excerpt. Legat. Num. 9*. And *SUETONIUS*, in the Life of *Julius Caesar*, (*Cap. XXV.*) There are also some Things, well worth reading upon this Head, in *FRANCIS GUILLIMAN, De Rebus Helvetiorum, (Lib. I. Cap. VIII.) GROTIUS*.

6. *LIVY, Lib. XXXIII. Cap. XII. Num. 5, and 9*.

7. *Sic Zorsini victo nihil ereptum. Annal. Lib. XII. Cap. XIX. Num. 3*.

8. *Pepin* left the Crown to *Aistulphus* the *Lombard*. *GROTIUS*.

King *Pepin* had neither in the first nor second Expedition he undertook against

V. Sometimes with the restoring of the Sovereignty, the Conqueror's Security is also provided for. ¹ Thus it was ordered by *Quintius*, that the City of *Corinth* should be restored to the *Achaeans*, but a ² Garrison put into the Citadel. And that *Chalcis* and *Demetrius* should be detained, till all Fear of *Antiochus* were over.

V. Sometimes
by placing of
Garrisons.

VI. The imposing of Tributes is oftentimes not so much to reimburse the Charges of a War, as for the Security both of the Conqueror and Conquered, for the future. *Cicero* writes thus of the *Greeks*, ¹ *Let Asia also consider, That she can never be free from a foreign War, or domestick Quarrels, if she be not secured by the Roman Empire, and since that cannot be done without Tributes; she may very reasonably part with some of her Wealth, to secure to herself a perpetual Peace.* *Petilius Cerealis*, in *Tacitus*, thus pleads for the *Romans*, with the *Lingones*, and other *Gauls*. ² *We, tho' so often provoked, yet, by the Right of Victory, exact of you only what is necessary to maintain Peace. For the Peace of Nations cannot be maintained without Arms, nor Arms without Pay, nor that without Tributes.* Agreeable hereunto is that which we have said ^a before, when we treated of unequal Alliances, as to deliver up one's Arms, Fleets, Elephants, to keep no Fort nor Army.

VI. Or by
Tributes, and
the like
Impositions.

^a B. ii. c. 15.
§ 7. n. 7.

Aistulphus, made himself Master of all that the *Lombards* possessed in *Italy*. He had only besieged *Pavia*, the Capital of their Kingdom. It is true, that as he came into *Italy*, at the Solicitation of Pope *Stephen*, he was contented with demanding of *Aistulphus*, by the Treaty of Peace, the Restitution of the Exarchat of *Ravenna*. See *EGINHARD, De vita Caroli Magni*, Cap. VI. with the Note of the last Edition; as also the Authors cited by Father *DANIEL, Hist. de France*, Tom. I. p. 371 & seq. Edit. *Amster*.

V. (1) Or rather by the ten Embassadors, sent by the *Romans* to conclude a Peace with *Philip*. *Postremo ita decretum est, &c.* *LIVY, Lib. XXXIII. Cap. XXXI. Num. 2.*

2. But the same *Flaminius* afterwards gave up this Article, as *POLYBIUS* informs us, *Excerpt. Legat. Num. 9.* and *PLUTARCH, Vit. Tit. Q. Flamin. (374.) GROTIUS.*

VI. (1) *Simul & illud Asia cogitet, &c.* *Lib. I. Epist. Ad Quint. frat. I. Cap. XI.*

2. *Nos, quamquam totiens lacessite, &c.* *Hist. Lib. IV. (Cap. LXXIV. Num. 1, 2.)* See what *AGATHIAS* says, concerning the Custom of the *Persians*, *Lib. IV. (Cap. IX.) GROTIUS.*

VII. *Profit arising from this Moderation.*

VII. I. But that their own Sovereignty should be left to the Vanquished, is not only agreeable to Humanity, but often also to Policy. This is commended among *Numa's* Laws, that he would have no Blood shed at the Rites of the God *Terminus*, thereby intimating, that nothing more contributed to a firm Peace than to live contentedly within our own Bounds. And *Florus* ¹ well observes, *It is harder to keep Provinces, than to conquer them; they are gained by Force, but must be retained by Justice.* Like to this is that of *Livy*, ² *It is more easy to conquer several Countries, one after another, than to keep them all together.* And *Augustus* says, in *Plutarch*, ³ *It costs less to conquer a great Empire, than to govern it when conquered.* <673> *Darius's* Embassadors tell *Alexander*, ⁴ *A foreign Empire is dangerous, it is hard to hold what one cannot grasp. It is easier to conquer some Places than to keep them. How much more easily do our Hands take than they can hold!*

VII. (1) *Sed difficilium est provincias obtinere, quam facere.* Viribus parantur jure retinentur. *Lib. IV. Cap. XII. Num. 29.*

2. *Parari singula acquirendo facilius potuisse, quam universa teneri posse.* *Lib. XXXVII. Cap. XXXV. Num. 6.*

3. Upon Occasion of *Alexander the Great*, who after having conquered a great Part of the World, at the Age of thirty-two Years, was in Pain about what he should do afterwards. *Apophthegm.* p. 207. D. So *DION CASSIUS* observes, that *Augustus* was praised for his Moderation, in contenting himself with the Dominions he possessed. *GROTIUS.*

The Passage of *DION CASSIUS* is in *Lib. LIII.* except the first Words, which our Author adds to it, no Doubt, from quoting by Memory; and which express the Approbation given by the Publick to the Moderation of *Augustus*. The Historian relates only what that Emperor believed his Duty to do, and the Advice he gave to the Senate upon it. p. 602. C. *Edit. H. Steph.* But *Tiberius*, his Successor, praised him for that, amongst other Things, in his funeral Oration, *Lib. LVI. p. 684. E. 685. B.* See also p. 678. A.

4. In the Passage cited by our Author in this Place, and which he takes from *QUINTUS CURTIUS*, there is not *peregrinum imperium*, but *praegrave*, that is to say, too weighty an Empire. *Periculosum est praegrave imperium: Difficile est continere, quod capere non possis.—Facilius est, quaedam vincere, quam tueri. Quam hercule expeditius manus nostrae rapiunt quam continent.* *Lib. IV. Cap. XI. Num. 8, 9.* If the Reader desires a greater Number of Authorities to confirm the present Reflection, he may find an ample Collection in the *Varii Discursus JANI GRUTERI in aliquot insigniora loca ONOSANDRI atque TACITI, Part I. p. 141, & seq.*

2. Which ⁵ *Calanus* the *Indian*, and before him *Oebarus*, ⁶ *Cyrus's* Friend, explains, by the Comparison of dry Leather, which when pressed down with your Foot on one Side, rises up on the other. And *T. Quintius*, in *Livy*, ⁷ by the Similitude of a Tortoise, who when he draws himself into his Shell is safe from Harm; but as soon as ever he peeps out, is presently in Danger. *Plato* ⁸ in his third Book of Laws, thus applies the Saying of *Hesiod*, *Omni dimidium plus, One half is better than the whole*. And *Appian* ⁹ observes, that when some Nations desired to be admitted under the *Roman* Government, they were refused; and to some Nations they appointed Kings. In the Opinion of *Scipio Africanus*, the *Roman* Empire in his Days was so large, that to desire more would be but Covetousness; to keep quietly what they had, would be sufficiently happy.

5. By this Comparison the *Indian* Philosopher intended to signify, that *Alexander* ought not to remove from the Midst of his Dominions; for in treading upon the Extremity of the Leather the Motion was occasioned, which ceased when he put his Foot upon the Middle of it. PLUTARCH, *Vit. Alexandr.* p. 701 E.

6. Our Author cites nobody here: But he took this Fact from *Aristides*, which he relates in his Eulogy of *Rome*. And the Comparison is said there to have been made in another Sense and View: For if the Rhetorician is to be believed, *Oebarus* used it, to give *Cyrus* to understand, when tired with travelling so much in his Dominions, that doing so was absolutely necessary, in Order to preserve Tranquillity and good Order; and that, if he contented himself with visiting only some Places, leaving Things to go as they would in others, it would be like treading upon Leather only on one Side, which is thereby kept under, whilst the other Parts of it rise up. *Orat. in Romae laudat.* p. 353, 354. Vol. I. *Edit. Paul Steph.* It is true the Panegyrist introduces this on Occasion of the antient *Persian* Kings, who neither knew how to push nor keep their Conquests in *Europe*. For the Rest, as I did not remember to have read any where this Saying of *Cyrus's* Favourite, and the Commentators upon PLUTARCH have not mentioned it, where he speaks of the *Indian* Philosopher: I should not have thought of looking for it in ARISTIDES, if I had not met with it by Chance, in running over the *Observationes Historico-Politicae* of MICHAEL PICART, formerly Professor at *Altorff*; in which he has collected (*Decad.* IV. Cap. VIII.) a great Number of Authorities, to shew that a Prince ought to reside in the Center of his Dominions, to have an Eye upon all Things from thence, and to maintain Order every where.

7. *Caeterum sicut testudinem, &c.* Lib. XXXVI. (Cap. XXXII. Num. 6, 7.) PLUTARCH has the same Thought. (*Vit. Flamin.* p. 378. D.) GROTIUS.

8. P. 690. E. Vol. II. *Edit. H. Steph.* The Passage of HESIOD is in his *Works and Days.* ver. 40.

9. He says, that he himself was witness to the Embassies of Nations which were rejected. *Praefatio.*

Wherefore that Prayer in which, at their solemn Purgations, the *Romans* used to intreat the Gods to prosper and enlarge their Empire, ¹⁰ he thus amended, that they would preserve it in perpetual Safety.

VIII. *Examples, and of the Change of Government among the Conquered.*

VIII. The *Lacedemonians*, and in the Beginning, the *Athenians*, never pretended to any sovereign Power over conquered Cities, they only insisted that they should use the same Form of Government with themselves. The *Lacedemonians* being under an Aristocracy, and the *Athenians* under a Democracy, as *Thucydides*, *Isocrates*, and *Demosthenes* inform us, and also *Aristotle* himself, in his eleventh Chapter of his fourth Book, and seventh of the fifth of the Republick; to which very Thing, *Heniochus*, a Writer of those Times, makes this Allusion in his Comedy,

¹ Γυναικάς δ' αὐτὰς δὴ ἐταράττετόν τινα
Ἄεὶ συνοῦσαι· Δημοκρατία θατέρᾳ <674>
Ἄνομ' ἐστὶ, τῇ δ' Ἀριστοκρατία θατέρᾳ,
Δι' ἃς πεπαρωνήκασιν ἤδη πολλάκις

*Two Women, turbulent in their Designs,
Arriv'd amongst them: Democratia
The one was call'd, Aristocratia th' other,
These some Time since distracted them.*

Tacitus mentions the same Thing done by *Artabanus*, in Regard to *Seleucia*, ² *He established Aristocracy for his own Interest, because popular Government comes nearer to Liberty, and the Dominion of a few Nobles somewhat resembles arbitrary Power.* But whether such Alterations ³ make for the Security of the Conqueror, it is not my Business to determine.

10. *Qui* [Africanus posterior] *quum lustrum conderet, &c.* VALERIUS MAXIMUS, *Lib. IV. Cap. I. (Num. 10.)* The Consul *Claudianus Julianus*, quotes this History, in his Letter to *Papianus* and *Balbinus*, (related by *CAPITOLINUS*, in *Maxim. & Balbin. Cap. XVII.*) GROTIUS.

VIII. (1) *Apud* STOBÆUM, *Serm. XLIII.*

2. *Id nuper acciderat, &c.* Annal. *Lib. VI. Cap. XLII. Num. 3.*

3. They may certainly be very much to his Prejudice, on Account of the particular Genius of every People, and their Attachment to that Form of Government to which they have been accustomed.

IX. But if it be not perfectly safe to leave to the Conquered their entire Liberty, yet it may be so moderated, that some Part of the Government may be left to them, or their Kings. *Tacitus* ¹ tells us, that it was the Custom of the *Romans*, to make even Kings Instruments of Subjection. So *Antiochus* is called, ² *The richest of all the Kings that were subject to them. Kings, Subjects of the Romans*, ³ in the Commentaries of *Musonius*. And in *Strabo*, ⁴ about the End of the sixth Book. Thus *Lucan*,

IX. *If the Sovereignty be assumed, part of it to be left to the Conquered.*

⁵ *Atque omnis Latio, quae servit purpura ferro.*

And every Prince that serves the Roman State.

Thus the Government continued among the *Jews*, in the *Sanhedrim*, ⁶ even after *Archelaus* had been stript of his Kingdom. And *Evagoras*, ⁷ King of *Cyprus*, (as *Diodorus* relates) said, he would obey the King of *Persia*, but that as one King did another. And *Alexander* offered to *Darius*, after he had overcome him, ⁸ That he should rule over others, pro-

IX. (1) *Vetere ac jam pridem recepta Populi Romani consuetudine, ut haberet instrumenta Servitutis & Reges.* Vit. Agricol. Cap. XIV. Num. 2.

2. *Antiochus—inservientium Regum ditissimus.* TACITUS, Hist. Lib. II. Cap. LXXXI. Num. 1.

3. By POLLIO VALERIUS.

4. *Geogr.* p. 288. Edit. Paris. Casaub.

5. *Pharsal.* (Lib. VII. ver. 228.) See also the Panegyrick in Honour of *Maximianus*, (Cap. X.) GROTIUS.

6. That is to say, they judged according to their own Laws, as did most of the People dependent upon the *Roman* Empire. For the Rest, before *Archelaus* was banished to *Vienna*, the compleat Sovereignty was no longer in the *Jewish* Nation. See the Note of GRONOVIVS upon this Place, and what is said above, *Book I. Chap. III. § 22. Note 3.*

7. It was upon those Conditions he concluded Peace. *Bibl. Hist.* Lib. XV. Cap. VIII. p. 462. Edit. H. Steph. See a little above, in the foregoing Chapter, and same Page.

8. In the same Manner the *Great King*, or King of *Persia*, had other Kings under him, as appears by this Verse of AESCHYLUS,

Βασιλεῖς βασιλέως ὑποχοι μέγαλου.

Kings subject to a greater King.

In *Persis*. There were antiently such Kings, dependent upon other Kings, in *Italy*, as SERVIUS observes on *B. X.* of the *Aeneid*, (ver. 655.) And there are still such amongst the *Turks*, as LEUNCLAVIVS relates, *Lib. XVIII.* GROTIUS.

^a B. i. c. 3.
 § 17. and B. iii.
 c. 8. § 3.

vided he would obey him, his Conqueror. We have already ^a treated of the Manner how a Government may be mixed. Sometimes, conquered Kings had Part of their States restored to them, and at the same Time, Part of the Lands ⁹ was left to the antient Possessors.

X. Or at least
 some Sort of
 Liberty.

X. Yet when all Sovereignty is taken from the conquered, there may be left to them their own Laws, about their private and publick Affairs, of small Moment, and their own ¹ Customs and Magistrates. Thus *Pliny's* Epistles tell us, that in <675> *Bithynia*, a Proconsular Province, the City ² *Apamea* was indulged to govern their State as they pleased themselves.

9. See *Chap.* III. of this Book, § 4. *Num.* 4. or last.

X. (i) The Emperor *Augustus*, as *PHILO the Jew* observes, was as careful to preserve and confirm the Laws of every Nation, as to maintain those of the *Romans*. In *Legat. ad Cajum.* (p. 1014. B. *Edit. Paris.*) *GROTIUS*.

MR. BYNKERSHOEK, in the ninth Chapter of his Dissertation upon the ninth Law of the *Digest, De Lege Rhod.* (p. 90) is for translating here, instead of *The Laws of each People*, as our Author renders it, the *antient Establishments* of each People: But he confesses at the same Time, that this principally regards the Laws. For the Rest, the Reader may see, and examine what the same Author advances in this Chapter; that the Nations, whom the *Romans* permitted to retain their own Laws, had this Liberty only so far as their Laws included nothing contrary to the *Roman* Laws.

2. *Habuisse* [Apameam] *privilegium & vetustissimum morem, arbitrio suo rempublicam administrare.* *Epist.* LVI. The City of *Sinope*, tho' dependent upon the *Persians*, was governed democratically, as *APPIANUS ALEXANDRINUS* informs us, *Bell. Mithrid.* So the *Greeks*, after their falling under the Dominion of the *Romans*, retained a Shadow of their antient Liberty. *Quibus* [Athenis & Lacedaemoni] *reliquam umbram, & residuum libertatis nomen erigere, durum, ferum, barbarumque est.* *PLINY, Lib.* VIII. *Epist.* XXIV. See also *CICERO, Lib.* VI. *ad Attic.* *Epist.* I. (p. 584. and II. p. 603. *Edit. Graevii.*) It appears by one of the Epistles of the latter, that the People of *Cyprus* could not be obliged to quit their Island to appear before any foreign Tribunal. *Nam evocari ex insula Cyprios non licet.* *Lib.* V. *ad Attic.* *Epist.* XXI. *GROTIUS*.

What our Author observes in the Beginning of his Note, concerning the City of *Sinope*; the Historian, whose Authority he uses, says of another City of *Pontus*, or of that mentioned in the Text, named *Amisus*. The Passage proves also, what our Author says there of *Lucullus*, to whom he ascribes the Concession of that Privilege. *Λούκουλλος δὲ καὶ Ἄμισσον,* &c. *APPIANUS ALEXANDRINUS, Bell. Mithrid.* p. 228. *Edit. H. Steph.* As *Sinope*, and the *Sinopians* are spoken of in the Beginning, and at the End, of this Passage, our Author, in hastily reading it, did not observe that all the rest of it relates to *Amisus*. And that this City is meant, appears from its being said, that it had formerly been a Colony of the *Athenians*; for we find the same Thing in

And in other Places, the *Bithynians* had their own Magistrates, and their own Senate. So in *Pontus*, the City of *Amisus*, by the Favour of *Lucullus*,³ was allowed its own Laws. The *Goths* left their Civil Law to the conquered *Romans*.

XI. 1. Another Privilege which ought to be allowed the Conquered, is¹ the Exercise of their antient Religion; unless they themselves, being convinced, are desirous to change it; which *Agrippa*, in his Oration to *Cajus*, (which *Philo* gives in his Relation of his Embassy) proves to be both very agreeable to the Vanquished, and not prejudicial to the Victor. And in *Josephus*, both *Josephus* himself, and the Emperor *Titus*,² objected to the rebellious *Jews* at *Jerusalem*, that, by the Favour of the *Romans*, they might use their own religious Ceremonies with so much Liberty, that they might drive away Strangers from their Temple, even at the Peril of their Lives.

XI. Especially in Religion.

2. But if the Religion of the Conquered be false, the Conqueror ought to take Care,³ that the true one be not oppressed; which *Constantine* did, by weakning *Licinius's* Party; and after him the antient Kings of *France*, and of other Nations.

XII. 1. The last Advice is, where the Empire is entirely and absolutely obtained, there we should treat the Conquered with Gentleness, and in such a Manner that their Interests may be blended with those of the Conqueror. *Cyrus* bid the conquered *Assyrians* be of good Courage, tell-

XII. At least we ought to use the Conquered with Mercy, and why.

STRABO, *Geogr.* Lib. XII. p. 547. *Edit. Paris.* and in the *Peripl.* ARRIAN. p. 16. *Edit. Hudson.* Vol. I. *Geogr. min.* who say nothing of this Kind in Relation to *Sinope*.

3. See the Passage referred to in the foregoing Note.

XI. (1) It is better that they should have some Kind of Religion than none at all; as we have observed above, in giving the Words of the Emperor *Severus*, (Chap. XII. of this Book, § 6. Note 1.) The *Goths* declared of old, that they would compel nobody to embrace their Religion. PROCOPIUS, *Gotthic.* Lib. II. (Cap. VI.) GROTIUS.

2. *De Bell. Jud.* Lib. VII. Cap. X. *Graec.* p. 949. G.

3. Provided it be done by lawful Means, that is to say, without having Recourse to Violence, except to oppose those who use it first, to establish or advance their Religion: Otherwise, all Methods but that of Persuasion are unlawful, both by natural Right and revealed divine Right.

ing them that their Condition should be the same it was before, except only that they would have another King; that they should enjoy their Houses, Lands, their Authority over their Wives and Children, as before; and if any one wronged them, he and his would take Care to see them righted. We read in *Salust*, ¹ *The Romans chose rather to gain Friends than <676> Slaves, and thought it safer to govern by Love than Fear.* In the Days of *Tacitus*, ² the *Britons* readily made their Levies, paid their Tributes, and performed all Duties enjoined them by the *Romans*, whilst they were not ill-treated; but they could not easily bear Wrongs, being so far conquered, as to be Subjects, not Slaves.

2. The *Privernian* Ambassador being asked in the *Roman* Senate, what Sort of Peace the *Romans* might expect from them, replies, *If you shall grant a good Peace, it will be firm and lasting; if a bad one, it will not hold long.* And he gives the Reason, ³ *Do not think that any People, or single Person, will ever continue longer in a Condition that he does not like, than he is absolutely forced to it.* So said *Camillus*, *That Empire is most secure, which is agreeable to those over whom it is exercised.* The *Scythians* told *Alexander*, *There is no true Friendship between the Lord and the Slave; and,*

XII. (1) *Ad hoc Populo Romano, jam a principe, inopi, melius visum, amicos, quam servos, quaerere; tutiusque rati, volentibus quam coactis, imperitare.* (Bell. Jugurth. Cap. CIX. Edit. Wass.) The *Lacedemonian* Ambassadors say in *THUCYDIDES*, that the Method of extinguishing the Animosity which subsists between two Enemies, is not for the Victor to abandon himself to his Resentment, and to make the utmost of his Superiority over the Vanquished, but to be reconciled with the latter, upon just and reasonable Conditions: For then, being gained by the Victor's Generosity, he believes himself obliged in Honour to shew his Gratitude, and is far from having any Thoughts of violating his Engagements. *Lib. IV. (Cap. XIX. Edit. Oxon.)* GROTIUS.

The Collection of *GRUTER*, already quoted, may be seen again in this Place, *Part II. p. 56. & seq.* where, upon a Passage of *TACITUS*, he cites a great Number of Authorities, which confirm the Reflections of our Author.

2. *Ipsi Britanni delectum, &c.* Vit. Agric. Cap. XIII. Num. 1.

3. It is not he who gives this Reason, but the Senate itself, or the Majority of the Senate, who generously took in good Part, and considered as Sentiments worthy of a brave Man, and a Freeman, what some amongst them had censured as too bold, and tending to excite other Nations to Rebellion. *Quid si poenam inquit [Consul] remittimus, &c.* Lib. VIII. Cap. XXI. Num. 4. & seq. What follows will confirm our Author's Position. *Ibi pacem esse fidam, ubi voluntarii pacati sunt; neque eo loco, ubi servitutem esse velint, fidem sperandum esse.*

in the midst of Peace, the Rights of War remain. And *Hermocrates*, in *Diodorus*, *It is not so glorious to overcome, as to use the Victory with Humanity.* In Order to make a right Use of Victory, the Saying of *Tacitus* ought always to be remembred, that *We cannot finish a War in a more happy and glorious Manner than by pardoning the Vanquished.* *Julius Caesar*, in a Letter he wrote when Dictator, says, *Let this be the new Way of conquering, to secure ourselves with Mercy and Liberality.*

*Moderation concerning those Things
which, by the Law of Nations, have not
the Benefit of Postliminy.*

I. *That internal Justice requires that what is taken away by an Enemy in an unjust War, be restored.*

^a Chap. 13. of this Book.

^b Ch. 10. § 3, &c.

I. 1. How far Things taken in a just War may be the Captors, I have declared ^a above, from which are to be deducted, what are recoverable by the Right of Postliminy; for these are to be esteemed as not taken. But Things taken in an unjust War, I have already ^b said, are to be restored, not only by the immediate Captors, but by others also, who shall happen to be possessed of them on any Account. For no Body can make over to another more Right than he has himself, say the ¹ *Roman* Lawyers; which *Seneca* briefly explains, ² *No Man can give what he has not to give*. If the first Captor did not become lawful Proprietor of them, according to the Rules of true Justice, then he cannot possibly be so, who derives all the Title he can have from him. Therefore the Right of Property which the second or third Possessor may have, is what we call external, that is, he is entitled to Defence by all judiciary Power and Authority, as if he were the right Owner; yet if he makes Use of this Right against him from whom the Things were unjustly taken, he acts dishonestly.

I. (1) *Traditio nihil amplius transferre debet, vel potest, ad eum, qui accipit, quam est apud eum, qui tradit.* Digest, *Lib. XLI. Tit. I. De acquir. rer. domin. Leg. XX. princip.* See also, *Lib. IX. Tit. IV. De noxalibus actionib. Leg. XXVII. § 1.*

2. *Quoniam nemo potest, quod non habet, dare.* De Benefic. *Lib. V. Cap. XII.*

2. For what some eminent Lawyers³ have decided concerning a Slave, who being taken by Robbers, afterwards fell into the Hands of the Enemy, that he was to be considered as a Thing stolen, though he had been Slave to the Enemy, and returned by Right of Postliminy. The same may be answered from the Law of Nature, concerning him, who being taken in an unjust War, and afterwards, by a just War, or some other Accident, comes into the Power of another. For by internal Right, there is no Difference between an unjust War and downright Robbery. And *Gregorius Neo-Caesariensis*, being consulted, made a correspondent Answer, when some of the Inhabitants of *Pontus*⁴ had recovered some Goods taken away by the Barbarians.

II. I. Therefore Things so taken, ought to be restored to them from whom they were taken, which we see frequently done.¹ *Livy*, relating how the *Volsci* and *Aequi* were overcome by *L. Lucretius Tricipitinus*, says, *That the Spoil was exposed for three Days in the Field of Mars, that every one might have that Time to come and acknowledge his own, and freely take it away.* And the same Author in another Place, speaking of the *Volsci*, defeated by *Posthumius* the Dictator, says,² *Part of the Spoil was restored to the Latins and Hernici, upon their owning of it, of another Part he made Portsale.* And again,³ *Two Days were allowed to the Owners to come and claim their Goods.* And the same Author, speaking of the *Samnites*'s Victory over the *Campanians*, tells us,⁴ *It was a most joyful one to the Conquerors, for they had retaken 7400 Prisoners; a vast Booty for their Confederates; and the Owners were summoned by Proclamation, to own and take their Goods by a certain Day.* And a little further he gives us the like Account of the *Romans*.⁵ *The Samnites endeavouring to take Interamna,*

II. *Examples.*

3. The Law is cited above, *Chap. IX.* of this Book, § 16. *Note 3.*

4. He is followed in this by *PET. ANT. DE PETRA, De Potestate Principis, Cap. III. Quaest. IV. BRUNINGUIS, De Homagiis, Conclus. CCXLI. GROTTIUS.*

II. (i) *Et auget gloriam, &c.* *Lib. III. Cap. X. Num. 1.*

2. *Praedae pars, sua cognoscentibus, &c.* (*Lib. IV. Cap. XXIX. Num. 4.*)

3. *Biduum ad recognoscendas res datum dominis.* [*Lib. V. Cap. XVI. Num. 7.* where he relates the Defeat of the *Tarquinians.*]

4. *Et quod laetissimum, &c.* *LIVY, Lib. X. Cap. XX. Num. 15.*

5. *Altero exercitu Samnites, &c.* *Idem. ibid. Cap. XXXVI. Num. 16. & seq.*

a Colony of the Romans, but not able to hold it, they plundered the Country, and carrying off a great Number of Men, Cattle, and other Things, they accidentally fell into the Hands of the Roman Consul, returning Conqueror from Luceria; nor did they lose only their Booty, but, being encumbered with their heavy Baggage, were themselves routed and slain. The Consul, by Proclamation, summoning the Owners to come to Interamna, to fetch their Goods, leaving his Army there, went to Rome, on the Account of chusing Officers. The same Author also, in another Place, speaking of the Booty which Cornelius Scipio had taken at Ilipa, a City of Portugal, says thus, ⁶ It was all exposed to View before the City, and Leave given to the Owners to take their own, the Rest was delivered to the Quaestor to be sold, and the Money arising from thence distributed to the Soldiers. ⁷ After the Battle of T. Gracchus at Beneventum, the whole Prey, except the Prisoners, and what Cattle were not owned within thirty Days, were given to the Soldiers: As we read in the same Livy.

2. Polybius writes of L. Aemilius, when he had conquered the Gauls, ⁸ He restored the Spoils to those that came for them. ⁹ Plutarch and Appian relate, that Scipio did the same, when at the taking of Carthage, he found there many Things consecrated to the Gods, which the Carthaginians had brought thither from the Cities of Sicily, and elsewhere, (*viz.* restored them to their first Owners). And so does Cicero, in his Oration against Verres, concerning the Jurisdiction of Sicily, ¹⁰ The Carthaginians had formerly taken the City of Himera, that had been one of the stateliest and richest of Sicily; Scipio looking upon it as an Act worthy of the Roman People, when the War was ended by the taking of Carthage, took Care that their proper Goods should be restored to all the Sicilians. And the same

6. *Pugnatum haud procul Ilipa, &c.* Idem. *Lib. XXXV. Cap. I. Num. 11.*

7. *Praeda omnis praeterquam, &c.* Idem. *Lib. XXIV. Cap. XVI. Num. 5.*

8. *Lib. II. (Cap. XXXI.)* GROTIUS.

9. Also DIODORUS SICULUS, *Excerpt. Peiresc.* and VALERIUS MAXIMUS, *B. I. Chap. I. Num. 6.* Also the Humanity of the last Scipio Africanus, was eminently famous; for when he had taken Carthage, he sent about to all the free Cities of Sicily, that they should, by their Embassadors, fetch back all the Ornaments of their Temples, which the Carthaginians had taken away, and to take Care that they were set up again in their former Places. GROTIUS.

10. *Etenim ut simul P. Africani, &c.* *Lib. II. Cap. XXXV.*

Author does largely speak of the same Act of *Scipio*, in his Oration against *Verres*, concerning Statues. <678> Thus the *Rhodians* restored four Ships to the *Athenians*, which they had recovered from the *Macedonians*, that had formerly taken them from the *Athenians*. So *Phaneas* the *Aetolian* (as *Livy*¹¹ says) thought it equitable, that all that had belonged to the *Aetolians* before the War, should be restored to them. Neither did *T. Quinctius* deny it, if the Demand had been only of Cities taken in War; and if the *Aetolians* had not broke the Conditions of the Alliance. Nay, even those Goods which had been consecrated at *Ephesus*, and which the Kings had afterwards made their own, the *Romans*¹² restored to their former State.

III. I. But if such Things should come to one in Way of Trade, may he not charge him, from whom they had been taken, with as much as they cost him? He may, as we have already^a said, in Equity, so far as the Recovery of the Possession of those desperate Things,¹ might probably

III. *Whether any Thing may be deducted.*

^a B. ii. ch. 10. § 9.

II. *Phaneas* & *pro societate belli*, &c. *LIVY*, *Lib. XXXIII.* (*Cap. XIII. Num. 9.* & seq.) *Pompey* restored *Paphlagonia* to *Attalus* and *Pylamenes*. *EUTROPIUS*, *Breviar. Lib. VI. Cap. XI.* By the Treaty of Alliance between the Pope, the Emperor *Charles V.* and the Republick of *Venice*, against *Solyman* it was agreed that each should recover what they had been dispossessed of, as we find in *PARUTA*'s *History*, *Lib. VIII.* and, in Vertue of that Clause, the Island of *Cephalenia*, which had been taken by the *Spaniards*, was restored to the *Venetians*. There is also a Passage in *ANNA COMNENA* to the same Effect, in that Part of her *History* which treats of *GODOFROY*, *Lib. XI. Cap. VI.* *GROTIUS*.

12. *STRABO*, *Geogr. Lib. XIV. p. 642. Edit. Paris.*

III. (i) But see what is said in the Place referred to in the Margin, *Note 3.* The Truth is, that it is proper to distinguish here, whether a Thing taken in an unjust War were honestly bought or not; that is to say, whether the Buyer did or did not know, that the Thing fell into the Seller's Hands, or the Hands of those from whom he had it by such a Title. If the Buyer knew that it did, he possesses it dishonestly, and, in consequence, ought to make a simple and absolute Restitution. If he did not know it, and there was no Reason to suspect it, he has all the Rights of an honest Possessor, and consequently he is not bound to restore, what he believed, and had Reason to believe, was lawfully acquired, without receiving all he had given for it of his own; according to the Principles which I have laid down in the Chapter here referred to, and in that of *PUFENDORF*, where the same Subject is treated. So that the Whole depends upon knowing, whether, in Case the Buyer was not ignorant that what he bought was taken in a War, he believed, or had Reason to suspect, that the War was unjust.

cost him, from whom they were taken. If then those Charges may be demanded of him, ² why may not also our Pains and Hazard be valued, as if a Person should recover another Man's Goods out of the Sea, by Diving? Apposite to this is the Story of *Abraham's* returning Conqueror of the five Kings to *Sodom*: *Moses* says, *He brought back all those Things, (viz. that they had taken away)*, as related before, *Gen.* xiv. 16.

2. Neither can the Offer made by the King of *Sodom*, Ver. 20, 21, 22, 23, 24. to restore to him the Prisoners, and to keep the Rest himself, as the Reward of his Pains and Hazard, be otherwise applied. But *Abraham* ³ being a Man not only of a pious <679> Mind, but also of a heroick

2. Our Author here proceeds imperceptibly to the Application of the Question he treats of, to the Things which the Enemy, from whom they were taken, had himself acquired by Arms in an unjust War. And here it is certain, that tho' in taking such Things from the Enemy, they are known to be the Property of another, that does not lessen our Right to demand a Reimbursement from the antient Proprietor of what it cost us to get Possession of his Effects; that is to say, not only of the Expences of the Expedition, but also the Pains taken, and Dangers incurred, to which we were not obliged to expose ourselves, for the Recovery of another's Goods. But farther, if the Person to whom the Effects belonged, having Opportunity and Means to endeavour their Recovery, remained idle, he is deemed to abandon them, and, in Consequence, the other, who has taken them from the unjust Possessor, then acquires them fully and absolutely. See what I have said above, *Chap.* VI. of this Book, § 1. *Note* 2.

3. This is what the Rabbi *JACCHIADES* remarks, in his Commentary upon *DANIEL*, *Chap.* V. ver. 17. *SULPICIUS SEVERUS* says, that the Patriarch, after having given the tenth Part of the Booty to *Melchisedek*, restored the Rest to those from whom it had been taken. *Eidemque* (Melchisedek) *decimas praedae dedit. Reliqua his quibus erepta erant, reddidit.* (*Hist. Sacra, Lib.* I. *Cap.* VI. *Num.* 6.) *St. AMBROSE*, speaking of the same Thing, says, that *Abraham* was rewarded by *GOD*, because he would receive no Recompence from Men. *Ideoque quoniam sibi mercedem, ab homine non quaesivit, a DEO accepit.* De *Abrah. Patriarch. Lib.* I. (*Cap.* III.) With this Action of *Abraham* may be compared something like it done by *Pittacus*, one of the seven Sages. He refused half of the Lands which the *Mitylenians* offered him, after they had recovered them under his Conduct. He believed, as *VALERIUS MAXIMUS* says, that the Greatness of the Spoil, should he accept it, would lessen the Glory of his Exploits. *Atque etiam quum recuperati agri—deforme judicans, virtutis gloriam magnitudine praedae minuere.* *Lib.* VI. *Cap.* I. *Num.* I. *extern.* *PLUTARCH*, speaking of *Timoleon*, [who accepted a magnificent House and a fine Estate] observes, that it is not dishonourable indeed to receive in the like Case, but that it is more glorious to refuse such Offers, and argues the highest Degree of an eminent Virtue, which can deny itself those Things which it is lawful to desire. *In Vit. Timoleon.* (in fin. p. 277. B. Vol. I. *Edit. Wechel.*) See

Spirit, would take nothing to himself; but of the Booty, (for, as we said before, that is what is meant ⁴) as being his due, he gave the tenth unto GOD; he deducted the necessary Expences of that Expedition, and some Part he desired to be given to his Confederates.

IV. As Things (taken in an unjust War) are to be restored to their proper Owner, ¹ so a People, or Part of them, are to be returned to their lawful Sovereigns, or even to themselves, if they were free before this unjust Conquest. Thus was *Sutrium* retaken, and restored to its Allies in the Time of *Camillus*, as *Livy* informs us. The *Lacedemonians* restored the *Aeginetae* and *Melii* ² to their Cities. And the Cities of *Greece*, which had been oppressed by the *Macedonians*, were set at Liberty by *Flaminius*; who, in the Conference with ³ *Antiochus*'s Embassadors, told them, it is equitable that all the Cities of *Asia*, which were of *Greek* Original, should be restored to their Liberty, which *Seleucus*, the Great-Grandfather of *Antiochus*, had taken by Force, and afterwards being lost, had been reconquered by this *Antiochus*: For, says he, *those Colonies were*

IV. *The People, or Part of them, to be restored, if unjustly possessed.*

what we have said above, *B. II. Chap. XIV. § 6. and Chap. IV. of this Book, § 2. GROTIUS.*

The Author expresses himself here, in the Original of this Note, as if *Timoleon* had refused, as well as *Pittacus*, what was offered him: *Facta Pittaci & Timoleonis, &c.* whereas he did quite the contrary, as I have distinguished by the Words in a Parenthesis; for that Reason I have changed the Turn of Expression, which conveyed a false Idea.

4. Not that the whole Booty consisted in this, there were also, no Doubt, Things amongst it that belonged to the five Kings.

IV. (1) The banished *Saguntines* were re-established by the *Romans*, after six Years Absence. [See *Livy, Lib. XXVIII. Cap. XXXIX.*] The Emperor *Marcus Antoninus* restored those to Liberty, who had been made Slaves during the War with *Avidius Cassius*; and caused also their Effects to be returned to the antient Proprietors. [*CAPITOLINUS, in Marc. Anton. Cap. XXV.*] The King of *Castile*, and other Princes, restored *Calatrava* to the Knights of that Order, whom the *Moors* had deprived them of it, as *MARIANA* relates, in his History of *Spain*, Lib. XI. (Cap. XXV.) See what has been said above, *Chap. X. of this last Book, § 6. GROTIUS.*

2. It was *Lysander* who commanded their Army at that Time. *Hist. Graec. Lib. II. Cap. II. Num. 5. Edit. Oxon.*

3. *Si sibi Antiochus pulchrum esse, &c.* *Livy, Lib. XXXIV. Cap. LVIII. Num. 10. & seq.*

not sent into Aeolia and Ionia to be subjected to the Kings of Asia, but to preserve a Nation so antient as that of Greece, and to propagate it throughout the World.

V. *In what Time the Obligation of Restitution ceaseth.*

V. It has been sometimes disputed, how long a Time is allowed, before this internal Obligation to Restitution may cease? But this Question, if it be between Subjects ¹ of the same State, is best decided by their own Laws, provided those Laws give a true Right, that sets the Conscience at Rest, and not an external Right only; which may be collected by a prudent Searching into the Words and Meaning of those Laws. But if it be between Strangers each to other, it can be decided only by just Presumptions of a tacit Dereliction; of which we have spoken enough in ^a another Place to our Purpose.

^a B. ii. ch. 4.

VI. *What is to be done in a dubious Case.*

VI. But if the Justice of the War be very doubtful, it will be best to follow the Advice of *Aratus* the ¹ *Sicyonian*; who in part persuaded the new Possessors ² to accept of Money in lieu of them; and in part advised the first Owners rather to accept of the Value of their Lands, than run the Hazard of recovering them. <680>

V. (1) That is to say, when a Thing taken from one Subject of a State, in an unjust War, on the Side of the Enemy who takes the Booty, is fallen into the Hands of another Subject of the same State.

VI. (1) *Cum quibus caussas cognovit, &c.* CICERO, *De Offic.* Lib. II. Cap. XXIII. King *Ferdinand* did the same in *Spain*, as *MARIANA* relates, *Lib. XXIX. Cap. XIV.* GROTIUS.

2. This is the Conduct an Arbitrator, rather than a Judge, should observe, who, in this Case, is indispensibly obliged to leave Things in the State they are, supposing there be no civil Law to direct his Judgment and Award. But, as the Laws themselves do not always regulate Things, so as to satisfy the Consciences of those who follow their Direction, the principal Question here is to know, what each ought then to do of their own free Will, and without Regard to any other Rules than those of natural Equity. Now when it is supposed, as our Author does, that the Justice of the War is very doubtful, there being no more Reason to regard the Acts of Hostility, as just or unjust, on one Side than the other, Reason requires that they be considered indifferently as just on both Sides, with Regard to the Effects of the Acquisition of Things taken. The Possessor then, as in all other doubtful Cases, has the best Right, and, consequently, those who hold any Thing from him, with a Title lawful in other Respects, may consider themselves as having lawfully acquired it.

Of Neuters in War.

I. It may seem needless for us to treat of those that are not engaged in the War, when it is manifest that the Right of War cannot affect them; but because, upon Occasion of War, many Things are done against them on Pretence of Necessity, it may be proper here, briefly to repeat what we have already mentioned ^a before, that the Necessity must be really extream, to give any Right to another's Goods. That it is requisite, that the Proprietor be not himself in the like Necessity. When real Necessity urges us to take, we should then take no more than what it requires. That is, if the bare keeping of it be enough, we ought to leave the Use of it to the Proprietor; and if the Use be necessary, we ought not to consume it; and if we cannot help consuming it, we ought to return the full Value of it.

I. *From Neuters nothing is to be taken but upon extream Necessity, and with restoring the full Value.*

^a B. ii. ch. 2. § 10.

II. 1. *Moses*, when he was obliged of Necessity to pass with the *Israelites* through the Country of the *Edomites*, he first offers to go through the Highway, and not to touch their Fields or Vineyards, and if they should want Water they would pay for it, *Numb.* xx. 17. The same did the Generals of the most renowned Probity amongst the *Greeks* and *Romans*. The *Greeks*, in ¹ *Xenophon*, under *Clearchus*, promise the *Persians* to march without doing any Damage; and if they would sell them Provisions, they would not by Force take Meat or Drink from any one.

II. *Examples of Abstinence, and some Precepts.*

II. (1) *De Exped. Cyr.* Lib. II. Cap. III. § 13. *Edit. Oxon.*

2. *Dercyllides*, in the same *Xenophon*,² led his Army through neutral Countries, without any Injury to the Confederates. *Livy*³ tells us of King *Perseus*, He returned into his own Kingdom, through Pthiotis, Achaia, and Thessaly, without any Damage to the Country. And *Plutarch*, of the Army under *Agis* the Spartan, They were a Sight to all the Cities of Greece,⁴ marching through Peloponnesus inoffensively, civilly, and almost without any Noise. Thus *Velleius* says of *Sylla*,⁵ You would think he came into Italy, not as a revengeful General, but as a Peace-maker, he marched his Army so quietly through Calabria and Apulia, with such particular Care of the Fruits, the Fields, the Cities, and the Men, as far as Campania.⁶ And *Tully*, of *Pompey* the Great, Whose Legions so marched into Asia, as not only the Hands of so great an Army, but not even so much as their Feet, could be said to have done the least Damage to any one that was peaceable. And *Frontinus*,⁷ of *Domitian*, When he built Forts on the Frontiers of *Ubii*, he ordered the Fruits of those Places which he was to intrench, to be appraised and paid for; and the Fame of that particular Act of Justice, gained him the Credit of all Men. And *Lampridius*, of *Severus's* Parthian Expedition,⁸ He managed it with so much Discipline, and so great a Reverence to his own Person, that his Men seemed rather Senators than Soldiers: The Tribunes so ready, the Captains so modest, the Soldiers so friendly, that wheresoever they came, the Country People, for so many and extraordinary

2. XENOPHON, *Hist. Graec.* Lib. III. Cap. I. § 8.

3. *Triduum, non plus, &c.* LIVY, *Lib. XLI. Cap. XXVII. Num. 6.*

4. PLUTARCH, *Vit. Agid.* p. 801. D. The same Author relates the same of *Flaminius*, in the Life of that famous Roman General. GROTIUS.

5. *Putares Sullam venisse in Italiam, &c.* VELLEIUS PATERCULUS, *Lib. II. Cap. XXV. Num. 1.*

6. *Cujus [Pompeii] legiones sic in Asiam, &c.* Orat. pro Leg. Manil. (*Cap. XIII.*) The same *Pompey* being informed, that his Soldiers committed Disorders in *Sicily*, during their March, ordered their Swords to be sealed up in their Scabbards, and punished those who were found to have broken the Seals. PLUTARCH, *Vit. Pomp.* (p. 624. A.) GROTIUS.

7. *Quum in finibus Ubiorum castella, &c.* FRONTINUS, *Stratagem.* Lib. II. Cap. XI. Num. 7.

8. *Quam [Parthicam expeditionem] tanta disciplina, &c.* LAMPRIIDIUS, *Vit. Alex. Sever.* Cap. L.

Benefits, honoured him as a God. The Panegyrist speaks ⁹ of the *Goths, Huns, and Alani*, <681> that served under *Theodosius*, *No Noise, no Confusion, no Plundering was there, as from Barbarians; but if their Provisions happened to fall short, they bore it patiently, and proportioned every one's Allowance to their Numbers.* And *Claudian* attributes the same to *Stilico*.

¹⁰ *Tanta quies, tantisque metus servator honesti
Te moderante fuit, nullis ut vinea furtis
Aut seges ereptâ fraudaret messe colonum.*

*You ruling us, so great was our Security
That all enjoy'd their own; the Vine her Tribute
Paid to the just Owner; the Husbandman
Received the fruitful Produce of his Fields.*

And ¹¹ *Suidas* to *Belisarius*.

9. *Nullus tumultus, nulla confusio, &c.* LATIN PACAT. *Panegy.* (Cap. XXXII. *Panig. ult.* I. XII.) There are many Things in *CASSIODORUS* upon the Moderation of the *Goths*, in Regard to the Subject in Question; for Instance, *Var.* V. 10, 11, 13. *Theodorick* their King prescribes it to them in these Words. *Illud tamen necessario componentes, ut venientium nullus provenire possit excessus nec possessorum segetes aut prata vastetis—Quia ideo exercitiales gratanter subimus expensas, ut ab armatis custodiatu intacta civilitas* Lib. V. *Epist.* XXVI. *Athalarick*, another King of the *Goths*, praises a Senator, whom he recommends, upon that Account. *Arma ejus nulla possessorum damna senserunt.* Lib. IX. *Epist.* XXV. *GROTIUS*.

10. *CLAUDIAN*, in *prim. Consulat. Stilich.* Lib. I. ver. 162. & seq.

11. See *SUIDAS*, upon the Word *Belisarius*. *PROCOPIUS*, that famous Captain's Companion, and the Witness of his Actions often praises his Moderation. The Reader need only see the fine Speech he ascribes to him, addressed to his Soldiers upon that Head near *Sicily*, when he went into *Africa*, *Vandalic.* Lib. I. (Cap. XII.) and the Manner in which he says *Belisarius* conducted himself in his march thro' that Country, *Ibid.* (Cap. XVII.) But I must add here another entire Passage, wherein the Historian gives his Hero the highest Praise on that account. "*Belisarius*," says he, "took so much Care of the Country People, that they never suffered any Violence from the Armies he commanded. On the contrary their Passage enriched them all, contrary to all Appearance, because they sold their Provisions and Wares to the Soldiers at their own Price. When the Corn was ripe, the Cavalry were hindered from spoiling it, and as to the Fruits, he would not suffer a single Apple to be gathered from a Tree." *Gothic.* Lib. III. (Cap. I.) *NICETAS* praises the *Germans* for acting in the same Manner in their Expedition to the Holy Sepulchre. *Vit. Manuel Commen.* (Lib. I. Cap. IV.) *NICEPHORUS GREGORIAS* relates also, that the good Discipline of the *Venetians*, and their Greatness of Soul, attended with Justice and Equity, was

3. This was brought about by those famous Warriors, by taking great¹² Care to provide for the Subsistence of their Army, by paying their Troops well, and by observing a strict Discipline, whose chief Law¹³ *Ammianus* says is, *That the Countries of those at Peace with us should not be wasted.* And in *Vopiscus*,¹⁴ *Let no one dare to take away a Chicken of another Man's, let none touch a Sheep, let none pluck a Grape, let none tread down the Corn, and let none demand Oil, Salt, or Wood.* And so in *Cassiodore*,¹⁵ *Let them live with the Provincials according to the Civil* <682>

much admired upon this Account. Not one, says he, of their whole Army, would take any Thing without paying for it, *Lib. IX.* (p. 188. Edit. Colon. 1616.) GROTIUS.

12. The *Roman* Generals, as *PLINY* observes, took special Care, that Commerce should not be interrupted during the War: *Curve Romani Duces primam semper in bellis commerciorum habuere curam?* *Hist. Natur. Lib. XXVI. Cap. IV.* Care should be taken that the Soldier may have wherewithal to buy, in order to prevent his being forced to think of pillaging; as *CASSIODORUS* says very well: *Habeat, quod emat, ne cogatur cogitare, quod auferat.* *Var. IV. 13.* See the same Author, *V. 10.* and *13.* GROTIUS.

13. He ascribes this Maxim to the Emperor *Julian*, who gives for the Reason of it, the Danger of the Soldiers committing Ravages, and thereby obliging the People, who suffer them, to break the Peace: *Adserens [Caesar] pacatorum terras non debere caleari, ne, ut saepe contigit, per incivilitatem militis occurrentia vastantis abruptè foedera frangerentur.* *Lib. XVIII. Cap. II. p. 205. Edit. Vales. Gron.* The Author refers here in a little Note to another Place in *AMMIANUS MARCELLINUS*, *Lib. XXI.* He had probably in his Thoughts the Exhortation of the same Emperor to his Soldiers, in an Harangue, where he animates them to march against *Constantius*. He represents to them, to induce them not to plunder and use the Provincials ill, that this Moderation had contributed more to their past Glory, than the Victories they had obtained over their Enemies: *Illud sane obtestor & rogo, observate ne impetu gliscentis ardoris in privatorum damna quisquam vestrum exsiliat sed cogitans* [I do not know whether the Copists should not have put *cogitans* for *cogitantes* in this Place: It is more natural to think, that the Emperor intended to refer this to the Soldiers, and to let them make the Reflection to themselves: The Fault might besides have easily crept in:] *Quod haud ita nos illustrarunt hostium innumerae strages, ut indemnitas Provinciarum & salus, exemplis virtutum pervulgatae.* *Cap. V. p. 293, 294. Edit. Vales. Gron.*

14. It is in a Letter writ by *Aurelian* before he was Emperor, to his Lieutenant General: *Nemo pullum alienum rapiat, ovem nemo contingat. Uvam nullus auferat, segetem nemo deterat: Oleum, sal, lignum, NEMO EXIGAT, &c.* *Vit. Aurelian, Cap. VII.*

15. *Ita tamen ut milites tibi commissi vivant cum Provincialibus Jure Civili, nec, insolescat animus, qui se sentit armatum: Quia clypeus ille exercitus nostri quietem debet praestare Paganis.* *Var. VII. 4.* Our Author had writ the last Words in this Manner: But in three Editions, which I have, I find *Romanis*, and I do not observe that the

Law, neither let them grow Insolent, because they are armed; for the Shields of our Army ought to protect those who wear none. To which we may add that in the sixth Book of *Xenophon's Expedition*,¹⁶ *We must not pretend to compel a State at Peace with us to give any Thing against their Will.*

4. From which Passages we may best understand that Advice of the great Prophet, even of him that was more than a Prophet, *Luke iii. 14. Offer Violence to no Man*,¹⁷ *accuse no Man falsely*, and¹⁸ *be content with your Wages.* To which agrees that of *Aurelian in Vopiscus* in the afore-quoted Place,¹⁹ *Let him be content with his Allowance, let him live rather on the Spoil of the Enemy, than the Tears of the Provincials.* Neither may any one think that this is only finely spoken, but not to be practised. For neither would so holy a Man (as *St. John*) advise, or wise Law-Makers

Editors or Commentators have noted any various Reading. The Opposition indeed is more just in following the Correction, which our Author seems to have intended. But the hard and incorrect Style of CASSIODORUS gives Reason to believe it not necessary.

16. *De Exped. Cyr. Lib. VI. Cap. II. § 4. Edit. Oxon.*

17. The Term of the Original (*συκοφαντεῖν*) may be rendered *to plunder, to take by Force*, as it is used in the *Greek Version*, *JOB xxxv. 9. Psalm cxix. 122. Proverbs xiv. 31. xxii. 16. xxviii. 3. Ecclesiast. iv. 1. and Leviticus xix. 11.* The common Version translates the same Word by *defraudare*, *LUKE xix. 8. GROTIUS.*

18. *St. AMBROSE* says upon this Passage, that the Custom of paying Troops was established to prevent their pillaging: *Docens, idcirco stipendia constituta militiae, ne dum sumtus quaeritur, praedo grassetur.* Comment. in *LUC. Lib. II. Cap. III. (p. 1647. Edit. Paris. 1569.)* A Thought which *St. AUSTIN* has copied, *Serm. XIX. De verbis Domin. secund. Matth.* There are some fine Ordinances upon this Head in *GREGORIUS TURONENSIS, Lib. II. Cap. XXXVII. in the Capitularies of CHARLES* and his Successors, *Lib. V. Tit. CLXXXIX. in the Councils of France, Vol. II. in the Capitularies of Lewis the Debonair II. 14.* See also *Lex BAJOARIORUM, Tit. II. 5. Frederick I. Emperor of Germany*, decreed by a Law of Military Discipline, that if a Soldier should set the Farm or House of such as live in Peace on Fire, he should be branded in the Forehead, and turned out of the Army after having been well bastinadoed. *GUNTHER* expresses this Regulation in his *Ligurinus* thus:

*Si quis pacificae plebis villasve, domosve
Usserit, abrais signabitur ora capellis,
Et pulsus castris post verbera multa recedet.*

(*Lib. VII. p. 385. Edit. Reuber.*) GROTIUS.

19. *Annonâ suâ contentus sit. De praeda hostis, non de lachrymis Provincialium, habeat.* *Vit. Aurel. Cap. VII.*

command what they believed not possible to be done. Lastly, ²⁰ What has been done we must necessarily own possible to be done. Therefore we have brought several Examples. To which we may add, that remarkable one ²¹ which *Frontinus* mentions out of *Scaurus*, that an Apple Tree full of Fruit standing within the Compass of the Ground where the Camp was pitched, was the next Day, after the Army was gone, found with its Fruit untouched.

5. *Livy* ²² relating how insolently the *Roman* Soldiers behaved in their Camp at *Sucro*, and that some of them in the Night-time pillaged the Neighbouring Country that was at Peace, adds this as the Reason, that all Things were done loosely and disorderly, without any regard to military Discipline. There is also another remarkable Place in the same Author, describing *Philip's* March through the Country of the *Denthelatae*; *They* ²³ *were indeed Allies* (says he) *but the Macedonians being in great Necessity plundered them, as if it had been the Enemy's Country; for robbing every where, they first laid waste great Houses, then some Towns, to the great Dishonour of the King, who heard his Confederates in vain calling upon the Gods and him for Assistance.* *Tacitus* ²⁴ says *Pelignus* very much blasted his Reputation, for that he preyed more upon the Allies, than Enemies. And the same Author observes, ²⁵ that the Soldiers of *Vitellius* were scandalously slothful throughout all *Italy*, and only <683> dreadful to those

20. GUICCIARDIN Reasons in this Manner, *Hist. Lib. XVI. GROTIUS.*

21. *Universi quoque exercitus, &c. Strateg. Lib. IV. Cap. III. Num. 13.* See, in regard to *Scaurus*, who is himself the General and Writer here spoken of, GERARD. JOHN VOSSIUS, *De Historicis Latin. Lib. I. Cap. IX.* The Author refers here to what SPARTIAN relates, of the rigorous Manner in which *Pescennius Niger* punished the stealing of a Cock, *Cap. X.*

22. *Omnia libidine ac licentia militum, nihil institutio ac disciplina militiae, aut imperio eorum qui praeerant, gerebatur, Lib. XXVIII. (Cap. XXIV. Num. 9.)*

23. *Socii erant: Sed propter inopiam, haud secus quam hostium fines Macedones populati sunt. Rapiendo enim passim, villas primum, dein quosdam vicos etiam evastarunt; non sine magno pudore Regis, quum sociorum voces, nequicquam Deos Sociales nomenque suum implorantes, audiret, Lib. XL. (Cap. XII. Num. 10, 11.)*

24. *Dum socios magis, quam hostes, praedatur.—Quod ubi turpi fama divulgatum, &c. Annal. Lib. XII. (Cap. XLIX. Num. 2.)*

25. *Per omnia Italiae municipia desides, tantum hospitibus metuendos, &c. Hist. Lib. III. (Cap. II. Num. 2.)*

that entertained them. And in *Cicero's* Oration against *Verres*, one of the Heads of the Accusation was this, ²⁶ *You have taken Care to have the peaceable Cities of our Allies and Friends plundered and wasted.*

6. And here I cannot omit the Opinion of some Divines, which I hold to be very right, that the King who does not give his Soldiers their just Pay, stands not only engaged to the Soldiers, but to his Subjects and Neighbours for the ²⁷ Damages consequent thereupon, which the Soldiers, compelled by pure Want and Necessity, have done them.

III. 1. On the other Side, it is the Duty ¹ of those that are not engaged in the War, to sit still and do nothing, that may strengthen him that prosecutes an ill Cause, or to hinder the Motions of him that hath Justice on his Side, as we have said ^a before. But in a dubious Cause ^b to behave themselves alike to both Parties; as in suffering them to pass through their Country, in supplying them with Provisions, and not relieving the Besieged. The *Corcyreans* in *Thucydides* ² tell the *Athenians*, if they would really be Neuters, they should either forbid the *Corinthians* to raise Men in the Country of *Attica*, or suffer them to do so too. The *Romans* ³ objected against *Philip* King of the *Macedonians*, that he had doubly broke the Alliance, first that he had injured the Confederates of the *Romans*, and then that he had assisted their Enemies with Men and Money. *T. Quinctius* urges the same in a Conference ⁴ with *Nabis*. *You say, I have not directly violated my League of Friendship with you. How*

III. *What is the Duty of Neuters to those that are engaged in War.*

^a *Ch. 1. of this B. § 5.*

^b *See a singular Instance in Paruta, B. 8.*

26. *Tu in iisdem locis Legatus Quaestorius, &c.* In *Verr. Lib. I. Cap. XXI.* GROTIUS.

The Passages from *Note 22.* to this Place are not in the first Edition. They interrupt the Connection of the Sense, and agree very little with what follows, and precedes them, as they are Examples of a Practice quite contrary to that of which the Author intends to shew both the Justice and Possibility. I am surprised that he has not quoted a Passage from *ONOSANDER* in this Chapter, who in giving Precepts to Generals of Armies does not forget this, that they forbid the Soldier to take or spoil any Thing in the Country of an Ally. *Strategic. Cap. VI. p. 14. Edit. Pigalt.*

27. See above *B. II. Chap. XXI. § 2.*

III. (i) See what is said upon *PUFENDORF, Law of Nature and Nations, B. VIII. Chap. VI. § 7. Note 2.*

2. *Lib. I. Cap. XXXV.*

3. *Dupliciter ab eo [Philippo] foedus, &c.* *LIVY, Lib. XXX. Cap. XLII. Num. 8.*

4. *Vos tamen, inquis, vestramque, Idem, Lib. XXXIV. Cap. XXXII. Num. 14, 15.*

often would you have me convince you that you have? But to sum up all in a few Words, by what Means may Friendship be broken? Certainly by these two chiefly, if you treat our Allies as Enemies, or if you join our Enemies.

2. *Agathias* tells us, he is an Enemy who does what pleases an Enemy; and *Procopius* ⁵ looks upon him to be in the Enemy's Army, who supplies them with Things that are properly useful in War. Thus said *Demosthenes* of old, ⁶ *He that invents, or prepares these Things, by which I may be taken, is mine Enemy, tho' he neither strikes me, nor throws a Dart at me.* *M. Acilius* ⁷ told the *Epirots*, who indeed had not assisted *Antiochus* with Soldiers, but were accused of having furnished him with Money, he could not tell whether he should account them Enemies or Neuters. And *L. Aemilius* ⁸ the Praetor complains of the *Teii*, that they had victualled the Enemy's Fleet, and promised them Wine, declaring, that unless they did the like to the *Roman Fleet*, he should hold them as Enemies. *Plutarch* mentions a Saying of *Augustus Caesar*, ⁹ *That City has forfeited her Pretensions to Peace, that entertains the Enemy.*

3. It would also be very advantageous to make an Alliance with both Parties, so as with their full Consent we might sit still in Quiet, and might be permitted to do common Offices of Humanity promiscuously to them both. *Livy* says, ¹⁰ *It becomes those that are Friends to both Parties, to desire Peace, and not to engage on either Side.* *Archidamus* King of *Sparta*, observing the *Aleans* inclining to side with the *Arcadians*, writ a Letter to them, with only this in it: *It is good to be quiet.* <684>

5. On the contrary, as the same Historian makes Queen *Amalasontha* say in a Letter to the Emperor *Justinian*, that not only joining a Prince with Arms in the Field, but to supply him publicly with all Necessaries of War, is being a Friend and Ally. *Gothic. Lib. I. (Cap. III.) GROTIVS.*

6. *Philipp. III. p. 46.*

7. *Militem tamen nullum Antiocho dederant [Epirotae] pecunia juvisse cum insimulabantur—Iis, &c. LIVY, Lib. XXXVI. Cap. XXXV. Num. 8, 9.*

8. *Et juvisse eos [Tejos] commeatu, &c. Idem, Lib. XXXVII. Cap. XXVIII. Num. 2.*

9. *In Brut. p. 1011. D.*

10. *Pacem utrique parti, quod medios deceat amicos, optent; bello se non interponant.* *LIVY, Lib. XXXV. (Cap. XLVIII. Num. 9.) Καλὸν ἡσυχία. [Apud PLUTARCHUM Apophtheg. p. 219. A.]*

*Concerning Things privately done
in a publick War.*

I. 1. What we have said hitherto, does most belong either to those who command with an absolute Authority in War, or those who act by Vertue of the Orders they have received from the Sovereign. We are now to see, what may be privately done in War, whether we respect the Law of Nature, of Nations, or the Divine Law. *Cicero* ¹ relates in his first Book of Offices, that the Son of *Cato* the Censor served in the Army under *Popilius* the General, and in a short Time that Legion was disbanded; yet the young Man out of a military Inclination still continuing in the Army, *Cato* writ to *Popilius*, if he designed to have him still in the Army, to give him a second Oath; adding the Reason, because the former being discharged he could not lawfully fight with the Enemy. He also records the very Words of *Cato* out of his Letter to his Son, in which he warns him from engaging in Fight, for it is not lawful, for one that is not a Soldier to fight an Enemy. *Plutarch* much commends ^a *Chrysantas* a Soldier of *Cyrus*, who drew back his Sword, that he had lifted up to kill his Enemy, upon his hearing the Trumpet sound a Retreat. And *Seneca* tells us, ² *He is a bad Soldier, who regards not the Signal of a Retreat.*

I. *Whether it be lawful to hurt a publick Enemy privately explained by the Law of Nature, of Nations and Civil Law.*

^a See *Xenophon, Cyr. Inst.*

2. But they are mistaken, who think this arises only from the external Right of Nations; for if you barely consider that, as it is lawful for any

I. (1) *POPILIUS Imperator tenebat, &c. De Offic. Lib. I. Cap. XI.*

2. *Tam inutilis animi minister est, quam miles, qui signum receptui negligit. De Ira, Lib. I. Cap. IX.*

^b *Ch. 3. of this Book, § 10, 12.*

one to seize on his Enemy's Goods, (as we ^b said before) so he may also kill his Enemy, for by that Right ³ Enemies are accounted as if they were not real Persons. What *Cato* therefore adviseth, proceeds from the *Roman* military Discipline, which had a Law ⁴ (as *Modestinus* observes) that he who disobeyed, should be put to Death, tho' he had had good Success; but he was understood not to have obeyed, who without the General's Command, fought the Enemy, as appears from the Example of *Manlius*. For if such a Thing were commonly permitted, the Soldier would abandon his Post of his own Head, or even Licentiousness might in Time proceed to such a Length, that the Whole Army or Part of it would rashly engage ⁵ in dangerous Fights; which was by all Means to be avoided. Therefore *Salust* describing the *Roman* Discipline, says,

3. *Pro nullis habentur*, says our Author, applying here what the *Roman* Lawyers say of Slaves with regard to civil Rights: *Quod adinet ad jus civile, Servi pro nullis habentur*. Digest, *Lib. L. Tit. XVII. De diversis Reg. Jur. Leg. XXXII.* But this Fiction, which in some manner excludes Slaves from the Number of Men, in order to rank them amongst the Goods of Fortune, is only founded upon the arbitrary Decisions of a particular Legislator, which can have no Place in the present Question. It were better to give this for the Reason of it; that neutral People, from only continuing such, being bound to regard the Acts of Hostility on both Sides, as equally just; it suffices, with regard to them, that he is a Person of one of the Parties, who has killed or plundered his Enemy: They have then no Business to trouble themselves whether he, who has committed such an Act of Hostility, acted or not by the publick Authority. For tho' we were to suppose a Law of Nations merely arbitrary, such as our Author imagines there is, as this Right would necessarily turn upon Things, of which the common Interest of Nations required the Observation; there would be nothing in this Case that can be referred to it, since it is of no import to Nations, whether private Persons do or do not, act against an Enemy of their own Head, and since the End of the War demands on the contrary, that all those of one Party may take all Occasions to hurt the other. So that the present Question can only regard the publick Right of every State. See what our Author observes at the End of this Chapter.

4. *In bello, qui rem a Duce prohibitam fecit, aut mandata non servavit capite punitur etiamsi res bene cesserit*. Digest, *Lib. XLIX. Tit. XVI. De Re Militar. Leg. III. § 15.*

5. *Avidius Cassius* punished some Officers of his Army with Death, who had gone without his Orders with an handful of Men to surprize three Thousand, tho' they had put the latter to the Sword and returned laden with their Spoils. He gave as his Reason for so severe a Sentence, that there might have been some Ambuscade: *Dicens evenire potuisse, ut essent insidiae, &c.* VULCATIUS GALLICAN. *Cap. IV. GROTIUS.*

⁶ *They were oftener punished in War, who contrary to Orders had fought the Enemy, or kept the Field after sounding a Retreat.* A certain Spartan, when just ready to kill his Enemy, stopt his Blow upon hearing the Retreat <685> sounded, and gave this Reason, ⁷ *It is better to obey our Commanders, than to kill an Enemy.* And Plutarch ⁸ gives this Reason, why a Man dismissed from the Service, cannot kill an Enemy, because he is not obliged by the military Laws, which they that are to fight must observe. And Epictetus in Arrian ⁹ relating the Action of Chrysantas, just mentioned, says, *He thought it much better to obey the Orders of his General, than his own Will.*

3. But if we respect the Law of Nature and true Justice, ¹⁰ it seems lawful in a just War for any Man to do those Things, which may be beneficial to the innocent Party, provided it be within the just Measure of making War: Every one however has not a Right to appropriate to himself what he takes from the other Party, whose Cause we suppose bad; because nothing is due to him: Unless perhaps he may exact a just Punishment by the common Right of Men. Which last how it is restrained by the evangelical Law, may easily be understood from what we have ^c said before.

^c B. 2. Ch. 20.
§ II.

4. An Order then may be either general or special; general, as when the Consul cried out in the Tumult among the Romans, ¹¹ *Let them that*

6. *Quod in bello saepius vindicatum est in eos, &c.* Bell. Catilinar. Cap. IX. Edit. Wass.

7. PLUTARCH, *Lacon. Apoph.* p. 236.

8. *Quaest. Rom.* XXXIX. p. 274. A.

9. *Lib.* II. *Cap.* VI.

10. This indeed proves, that the Enemy is not wronged, when a private Act of Hostility is committed against him; but it does not follow from thence, that in Civil Society a private Person can act against the Enemy without the express or tacit Order of those, who are invested with the publick Authority. So that the Question, as we have said, relates to publick Right: And the Law of Nature, upon that Foot, far from leaving every one at Liberty to commit Acts of Hostility of his own Head, requires on the contrary, that in a Thing of so great Importance, and which relates to one of the principal Parts of Sovereignty, nothing should be done without the particular or general Permission of the Sovereign, or his Ministers; since that is a necessary Consequence of the Engagement of a Subject, considered as such.

11. *Aut certè si esset tumultus, &c.* SERVIUS in Aeneid. VIII. I.

wish well to the Commonwealth, follow me. Nay, this Right ¹² of killing is sometimes granted to every Subject, even beyond his own Defence, when the publick Safety requires it.

II. *What may they do, that make War at their own private Charge, or fit out Ships, by internal Justice, in respect of the Enemy.*

^a *B. 3. Ch. 6. § 23, 24.*

II. 1. They may have a special Order, not only who receive Pay, but also they who serve in War at their own Expences, and what is more, they who maintain Part of the War at their own Charges; as they who fit out Ships, and maintain them at their own private Cost; who to reimburse themselves (*instead of Pay*) are allowed to keep and appropriate to themselves what they take, as we have ^a said elsewhere; but how far this may be reconcilable to true Justice, and Charity, may very well admit of a Dispute.

^b *B. 3. C. 13.*

2. Justice either respects the Enemy, or the State, with which we contract. We have already ^b said, that in a just War the Possession of all Things that can contribute to the Maintenance of the War, may for our own Security be taken away from an Enemy, but even this with a Condition of Restitution; but the Property of those Things can be only so far acquired, as amounts to the Value of what is due to the State, either at the beginning of the War, or in the Prosecution of it, whether the Things belong to the State at Enmity with us, or particular Persons, that may be of themselves innocent; but the Goods of the Guilty, by way of Punishment, may be taken away, and become the Property of the Captor's. Therefore the Goods of their Enemies shall be theirs, who maintain Part of the War at their own Charge; what respects the Enemy, so far, as that the reasonable Satisfaction on which I have mentioned, be allowed, to be adjudged by equal Arbitrators.

III. *What in respect of their own State.*

III. And as to the State, the very same will be just, according to internal Justice, if there be an Equality in the Contract, that is, if our Charges and Hazard be equal to the uncertain Hope of the Booty. But if this

¹². Declarations of War sometimes not only license, but order, *The Subjects of an Enemy to be attacked wherever they are found.*

Hope ¹ does far exceed, the Overplus is to be restored to the State; just as if one should buy at a very low Price the cast of a Net, the Success of which, tho' uncertain, promises much, according to all Appearance. <686>

IV. But it is not enough that we do nothing against the Rules of rigorous Justice, properly so called; we must also take Care that we offend not against Charity, especially Christian Charity. Now this may happen sometimes; when, for Instance, it appears, that such a plundering doth not so much hurt the State, or the King, or those who are culpable themselves, but rather the Innocent, whom it may render so extremely miserable, that if we should use the like Extremity to our own private Debtors, it would be judged barbarously cruel. But farther, if the taking of this Booty neither contributes to the finishing of the War, nor considerably weakens the Enemy, ¹ the Gain arising to himself only from the Unhappiness of the Times, would be highly unbecoming an honest Man, much more a Christian.

IV. *What the Law of Christian Charity requires of us.*

V. But it happens sometimes, that from the Occasion of a publick War, there arises a private one; as if a Man should by Chance fall among his Enemies, and be thereby in Danger of losing his Life or his Goods, in which Case he ought to follow the Rules we have given ^a elsewhere concerning the just Defence of ones self. Private Persons are likewise often authorised by the State to act for their own particular Interest; as when having suffered much by the Enemy they obtain Permission to refund

V. *How a private War may be mixt with a publick.*

^a B. 2. C. 1.

III. (1) It has been said with Reason, that it is very difficult to make an exact Estimate in this Case; but I do not think it in the least necessary: There is great Reason to presume, that the Sovereign in having authorised Voluntiers, Partisans, and those who fit out Vessels to make Incursions upon the Enemy, and to keep the Booty for themselves, was also willing, that the Whole, however great it were, should be theirs; unless he had previously reserved a Part of it to himself. These Captures are generally not considerable enough with regard to the State, tho' they are so to the private Persons who take them, and may therefore be left entirely to them, without Prejudice to the Publick.

IV. (1) PLUTARCH blames *Crassus* for this in his Life, p. 543. D. GROTIUS.

themselves out of their Effects. And here we are to regulate ourselves by

^b B. 3. C. 2. what has been said above ^b of the Right of Reprisals.

VI. *What he stands obliged to, who without Command hurts an Enemy, explained with a Distinction.*

VI. Yet if a Soldier, or any other Person, even in a just War, shall burn the Enemy's Houses, lay waste their Fields, and commit such other Acts of Hostility, without any Command, and besides when there is no Necessity, or just Cause, in the Opinion of the Divines he stands obliged to make Satisfaction for those Damages. I have with Reason added, what they have omitted, if there be not a *just Cause*; for if there be, he may perhaps be answerable for it to his own State, whose Orders he hath transgressed, but not to his Enemy, to whom he hath done no Wrong. Not unlike to this was the Answer ¹ which a certain *Carthaginian* made to the *Romans*, when they demanded *Hannibal* to be delivered up to them. *The Question is not whether Saguntum was besieged by private, or publick Authority, but whether the Fact were just or unjust? For it is our Business to call our own Subject to an Account, whether he did it of his own Head or by our Order? The only Point to be decided between you and us, is whether the Thing could be done without Prejudice to our Treaties.*

VI. (1) This Passage is quoted above, B. I. Chap. III. § 5. Num. 4.

Concerning Faith between Enemies.

I. I. We have already ^a said, what, and how much may be lawfully done in War, [[th]]is † either considered simply in itself, or with regard to a foregoing Promise. The first Part being concluded, the other remains to be discussed, which is, concerning Faith (to be kept) between Enemies. It is a remarkable Saying of *Silius Italicus*, who had been a *Roman Consul*,

I. Faith is to be kept with all Sorts of Enemies.

^a *B. 3. Ch. 1. § 1.*

¹ ——— *Optimus ille
Militiae, cui postremum primumque tueri
Inter bella fidem ———*

The most excellent Warrior is he who has nothing so much at Heart, as the punctual Observance of his Word to an Enemy. <687>

Xenophon ² in his Oration concerning *Agesilaus*, says, *So great and noble a Thing it is for every Man, but especially for Generals to be strict Observers of their Faith, and to be so accounted.* And *Aristides* ³ in his fourth *Leuctrica*. *It is in Treaties of Peace and other publick Conventions, that we chiefly know whether those that make them love Justice.* For as *Cic-*

† [[The original text simply reads “is,” which is clearly a misprint. I have emended it in line with the passage referred to in the marginal note.]]

I. (i) *Punic*. Lib. XIV. (Ver. 169. & seq.) The Philosopher *Archelaus*, as *APPIANUS ALEXANDRINUS* relates, said, that Treaties solemnly made and sworn, ought to be sacred and inviolable, even between Enemies. *Bell. Civil*. Lib. IV. (p. 628. *Edit. H. Steph.*) *GROTIUS*.

2. *Cap.* III. § 5. *Edit. Oxon.*

3. *P.* 184. *C.* Vol. II.

ero ⁴ well observed in his fifth Book of Bounds, *There is no Body, but approves and commends that Disposition of Mind, by which not only no Interest is sought, but on the contrary Faith is kept against Interest.*

2. It is the publick Faith, as it is in *Quintilian the Father*, ⁵ that procures a Truce between armed Enemies, and preserves the Rights of yielded Cities. And the same Author in another Place: ⁶ *Faith is the surest Bond of human Things, the Reputation of Faith is sacred among Enemies.* And so St. ⁷ *Ambrose: It is plain that Faith and Justice must be strictly observed in War.* And in St. *Augustine*, ⁸ *When our Faith is engaged, it must be kept even to our Enemy, tho' at that Time at War with him.* For their being Enemies, does not make them cease to be Men. And all Men arrived at the Years of Discretion are capable of a Right from a Promise. *Camillus* declares in *Livy*, ⁹ *That he had such a Society with the Falisci, as was established by Nature.*

3. From this Society founded on Reason and Speech, arises that Obligation from a Promise, which we now treat of. And we are not to imagine that, because it is permitted to tell a Falshood to an Enemy, or because, according to the Opinion of several, there is no Harm in it, as we

4. *Nemo est igitur, qui non hanc, &c.* De finib. bon. & mal. Lib. V. Cap. XXII.

5. *Ego publicam adpello fidem, quae inter Piratas sacra est: Quae inter armatos hostes inducias facit: Quae deditarum civitatum jura conservat.* Declam. CCXLVII. in fin. p. 505. Edit. Burman.

6. *Fides supremum rerum humanarum vinculum est: Sacra laus fidei inter hostes.* Declam. CCCXLIII. p. 721.

7. *Liquet igitur, etiam in bello fidem & justitiam servari oportere.* De Offic. Lib. II. Cap. XXIX.

8. *Fides enim quando promittitur, etiam hosti servandum est, contra quem bellum geritur.* Epist. CCV. *Ad Bonifac.* This Father treats the same Subject at large in Letter CCXXV. GROTIUS.

To the Passage cited here St. AUSTIN adds, that with much greater Reason we ought to keep our Promise made to a Friend: *Quanto magis amico pro quo pugnatur?* It is probable that he had in View the following Words of JOSEPHUS, the Jewish Historian: *Ὅς ἤγε πίστις ἔχουσα καὶ πρὸς τοὺς πολεμωτάτους τόπον, τοῖς γε φίλοις ἀναγκαιοτάτη τετηρήσθαι, &c.* Antiq. Jud. Lib. XV. Cap. VIII. p. 521.

9. *Nobis cum Faliscis, quae pacto fit humano, societas non est: Quam ingeneravit natura, utrisque est, eritque.* LIVY, Lib. V. Cap. XXVII. Num. 6. See what I have said upon PUFENDORF, *Law of Nature and Nations*, B. VIII. Chap. VII. § 2.

have observed ^b elsewhere; we may extend such a Permission to the very Words we use in treating with the Enemy. For the Obligation to speak Truth arises from a Cause, prior to War, and perhaps may be in some Measure annihilated by War, but a Promise of itself confers a new Right. Aristotle ¹⁰ perceived this Difference, when treating of Veracity, he said, *I do not speak of him, who says the Truth in the Conventions he makes, nor what relates to Justice or Injustice; for these Things belong to another Virtue.*

4. Pausanias ¹¹ said of Philip of Macedon, *No Body can justly call him a good General, who has always despised his most solemn Oaths, and has upon the slightest Pretence broke his Faith, the most of any Man.* And the like says Valerius Maximus of Hannibal. ¹² *A profest Enemy to the Romans, and all Italy, and a greater to Faith itself, glorying in Lies and Falseness, as if laudable Virtues; whence it came to pass, that whereas he might otherwise have left an illustrious Memory of himself, he now left it disputable, whether he ought to be considered as a great Man, or a notorious Villain.* In Homer, the Trojans pricked in Conscience condemn themselves.

¹³ Νῦνδ' ὄρκια πιστὰ

Ψευδάμενοι μαχόμεσθα τῶ οὐ νύ τι κάλλιον ἔστι. <688>

Unjust Arms we bear,

Perjur'd as we are.

10. *Ethic. Nicomach.* Lib. IV. Cap. XIII. See what I have said upon the *Preliminary Discourse*, § 44. Note 4.

11. *In Arcadic.* Cap. VII. p. 241. *Edit. Wech.*

12. *Nonne bellum adversus, &c.* (Lib. IX. Cap. VI. Num. 2. *Extern.*)

13. The Passage of HOMER cited here is not exactly repeated. The Author trusting without doubt to his Memory, has said, *καλλίον ἔστι*, where he finishes the Sense, but in the Original there is:

——— *Τῶ οὐ νύ τι κέρδιον ἡμῖν*

Ἔλπομαι ἐκτελέεσθαι, ἵνα μὴ ῥέξομεν ὧδε.

That is to say: *I believe our Affairs will not prosper, if we do not this*, or if we do not restore *Helena* to the *Greeks*, with all her Riches. In which the Sense is finer, and conveys another important Reflection to dissuade from Perfidy.

II. *The Opinion refuted, that Faith is not to be kept with Pirates and Tyrants.*

II. I. We have already said, that we may not allow of that of *Cicero*,¹ *There is no Society with Tyrants, but rather the greatest Division: And again, A Pirate is not of the Number of those with whom we make War in form; there ought to be no Faith nor Oath kept with him.* Nor that of *Seneca*² concerning a Tyrant, *Whatever Engagements I had with him, they are all void, because he has violated the Laws of human Society.* From which Fountain arose that Error of *Michael of Ephesus*, who says on the fifth of the *Nicomachia*,³ *It is no Adultery to debauch the Wife of a Tyrant.* Which very Thing^a some of the *Jewish* Doctors erroneously maintained concerning Strangers, whose Marriages they esteemed void.

^a *R. Levi Ben. Gerson, and R. Salomo, ad Levit. xx. 10.*

2. ⁴ Yet *Cn. Pompey* finished most of the piratick War by Treaties, agreeing to save the Men's Lives, and allow them a Place where they might live without robbing. And sometimes Tyrants have restored Liberty on Condition of Impunity. *Caesar* in his third of the Civil War writes, that the *Roman* Generals compounded with the Robbers, and Fugitives, that were in the *Pyrenean* Mountains. Now who can say that such a Composition is not obligatory?⁵ Indeed such Sort of People have not with others that particular Community, which the Law of Nations hath introduced between Enemies engaged in a solemn and compleat War. But yet, as Men, they are to enjoy the common Benefits of the Law

II. (i) See PUFENDORF upon this Subject, *Law of Nature and Nations*, B. III. Chap. VI. § 9. and II. and B. IV. Chap. II. § 8. The Passages of CICERO are quoted in B. II. Chap. XIII. § 15.

2. *Quidquid erat, quo mihi cohaereret, intercisâ juris humani Societas abscedit.* De Benefic. Lib. VII. Cap. XIX.

3. SENECA the Father says also, *Non putavi adulterium, uxorem Tyranni polluere, sicut nec homicidium, Tyrannum occidere.* Excerpt. Controvers. Lib. IV. Cap. VII. The Lawyer JULIUS CLARUS believed, that Adultery might be committed with Impunity with a banished Woman. In § *Homicidium*, Num. 36. GROTIUS.

4. See his Life in PLUTARCH, p. 632, 633. Vol. I. Edit. Wechel.

5. *Didius* was blamed for his shameful Perfidiousness to the *Celtiberians*, an antient People of *Spain*, who lived by Rapine. GROTIUS.

Our Author had in his Thoughts what *Titus Didius* the *Roman* General acted in regard to the *Celtiberians*, settled near the City of *Colenda*, as APPIANUS ALEXANDRINUS relates it. *De Bell. Hispan.* p. 312. Edit. H. Steph. For the Rest, I find no where else, not even in the antient Geographers, this City of *Colenda*: Neither does the learned CELLARIUS in his antient Geography mention it.

of Nature, as *Porphyry*⁶ rightly argues in his third Book of not eating living Creatures; now it is one of the most inviolable Laws of Nature, that we should perform what we promise. So *Diodorus*^b relates, that *Lucullus* kept his Faith to *Apollonius* Captain of the Fugitives. Thus *Dio* writes, that *Augustus* paid to *Crocota* the Robber, who surrendered himself, the Price he had set upon his Head, because he would not break his Word.

^b *L. 36. Ecl. 3. L. 56. p. 686. Edit. H. Steph.*

III. I. But let us see if we cannot produce something more plausible than what *Cicero* has said; and first, they who are notoriously wicked, and Members of no civil Society, may be punished by any Man, according to the Law of Nature, as we have^a declared above. But they who may be punished, even with Death, both their Goods, and their Rights may be taken from them. As the same *Cicero* well observes,¹ *It is not against Nature to strip him, if we can, whom it is lawful to kill.* But among his other Rights, is also a Right derived from Promise, and therefore this too may be taken away from him by way of Punishment. To this I answer, that the Reason would be good, if we had not treated with him as an Offender; but if we treat with him as such, it is to be understood, as if we in that Respect, remitted the Punishment, because, (as we have said^b elsewhere) we are [[not]] † to explain the Sense of a Convention, so as that it may be reduced to nothing.

III. *This Objection answered, that such deserve Punishment, and it is shown that this is not considered, when we treat with them as such.*

^a *B. 2. Ch. 11. § 7.*

^b *B. 2. Ch. 16. § 6.*

2. *Nabis* replied well in *Livy*, when *Quintius Flaminius* objected Tyranny to him.² *Whatever Name is given, and whatsoever I am, just the same*

6. *De abst. animal. Lib. III. p. 322. Edit. Ludg. 1620.*

III. (1) The Passage is recited above, *Chap. V.* of this Book, § 1. *Note 1.*

† [[This word is missing in the English text but should clearly be supplied: the Latin reads *ea sumenda est interpretatio quae cavet ne actus in vanum recidat*, and that is the theme of the passage referred to in the marginal note.]]

2. *De nomine hoc* [Tyranni] &c. *LIVY, Lib. XXXIV. (Cap. XXXI. Num. 12, 13, 15.)* In *TERENCE* a Merchant of Slaves says, “Tho’ I am a Pimp, the common Bane of Youth, a perjured Wretch, a publick Nuisance, yet I never wronged you.”

*Leno sum, fateor, perniciis communis adolescentium,
Perjurus, pestis: Tamen tibi a me nulla est orta injuria.*

Adelph. (Act II. Scen. I. Ver. 34.) See the Author, who has writ concerning the Treaty of Peace between the Princes and States of the Empire of *Germany.* *GROTIUS.*

I was, when <689> you yourself (O T. Quintius) made a Treaty with me. And again, I had done these Things already, whatsoever they are, when you contracted an Alliance with me; to which he adds, If I had changed, I ought to give an account of my Inconstancy; but since you have changed, you ought to give an account of yours. Like to this there is a Place in the Oration of Pericles, recorded by Thucydides, We shall let those Cities remain free, which were so when we made an Alliance with them.

IV. *No Objection, that the Promise was extorted by Fear, if the Promiser was not himself affrighted.*

^a B. 2. Ch. II. § 7.

IV. That may likewise be objected, which I said ^a before, that he who through Fear has forced a Promise from one, ought in Equity to release the Promiser, because he damnified him by Injustice, that is, by an Act both repugnant to the Nature of human Liberty, and to the Nature of the Act extorted, which should have been free. Tho' this (I confess) in some Cases holds true, yet it does not respect all Promises made to Robbers; for that the Promised be obliged to disengage the Promiser, it is required, that he have extorted the Promise by an unjust Fear. If any one then, to deliver his Friend out of the Hands of Robbers who have taken him, shall promise to pay a certain Sum of Money, he is bound to do it, ¹ because he cannot pretend to have been influenced by Fear, who came voluntarily to make this Contract.

V. *Or if there passed an Oath, tho' with Men, such a Violation is not punishable.*

^a B. 2. Ch. 13. § 14. &c.

V. Add to this, that he that is compelled by an unjust Fear to make a Promise, may be obliged to perform it, if he has confirmed it by an Oath, for thereby (as I have said ^a before) the Man stands bound not only to a Man, ¹ but unto GOD, in regard to whom Fear can be no Exception. Yet it is true, that the Heir of the Promiser does not stand engaged by such a Bond alone; ² for those Things only pass to the Heir, which by the original Establishment of the Right of Property, enter into the Commerce of Life: But the Right acquired unto GOD by an Oath, cannot

IV. (i) But see what I have said upon PUFENDORF, *Law of Nature and Nations*, B. III. Chap. VI. § II. Note II.

V. (i) But we have rejected this Principle, after PUFENDORF, in B. II. Chap. XIII. § 14. & seq.

2. See what I have said after PUFENDORF, *Law of Nature and Nations*, B. IV. Chap. II. § 17.

as such be included in these. Again, as we have likewise observed elsewhere, if a Man does happen to break his Faith to a Robber, whether sworn, or not sworn, he shall not upon that Account be liable to Punishment among other Nations; because in Detestation to Thieves and Robbers, all Nations by a general Consent are pleased to connive at any Thing (even tho' ill) done against them.

VI. What shall we say of the Wars ¹ that Subjects make against their Kings, or such as have the supreme Authority? Tho' they may possibly have a Cause not in itself unjust, ² yet that they cannot have a Right to act by Force against their Prince, I have shewed ^a elsewhere. But sometimes their Cause may be so very unjust, or their Resistance so criminal, that it may deserve a rigorous Punishment. Yet, if they be treated with as Deserters, or Rebels, ³ and a Promise made to them; a Punishment, tho' justly due, is not to be pleaded to prevent the Performance of that Promise, according to what we have now said. Faith is to be kept even with Slaves; and the Morality of Pagan Antiquity was so pure, as to own † the Truth of that Maxim: It being generally believed, that the *Lacedemonians* suffered a Divine Vengeance ⁴ for putting to Death some *Taenarian* Slaves, contrary to their Covenants. And *Diodorus Siculus* ob-

VI. *The same applied to the Wars of a Sovereign against his Subjects.*

^a B. I. C. 4.

VI. (i) Compare this again with PUFENDORF, B. VIII. Chap. VIII. § 2.

2. We have also shewn in the Notes upon B. I. Chap. IV. how far this Obligation of Non-Resistance extends, to judge of it by Principles, that have nothing extravagant either on one Side or the other.

3. This Obligation is the more inviolable, as Sovereigns are very apt to treat as Rebellion and Disobedience a Resistance, by which the Subject only maintains his just Rights, and opposes enormous Violations of the Engagements of Sovereigns, either as such, or by Virtue of the fundamental Laws of the State. History furnishes but too many Instances of this Kind.

† [[There is a misprinted footnote number "4" at this point in the original.]]

4. This was a terrible Earthquake, which happened at *Lacedemon*, and threw down the Whole City, five Houses only excepted, as AELIAN relates, *Var. Histor. Lib. VI. Cap. VII.*

In this Passage of AELIAN, it is very likely that instead of the Words, which our Author translates *Slaves of Taenarus*, *τοὺς ἐκ Ταυάρου οἰκέτας*, the reading ought to be (and is) according to some Manuscripts, *Τοὺς ἐκ Ταυάρου ἰκέτας*, that is to say, *Suppliants*, as the late Mr. PERIZONIUS observes in his Note upon this Passage.

serves, that the Faith given to Slaves in the Temple ⁵ of the *Palician* Gods, was never broken by any of their Masters: Neither will any Exception of Fear be allowed in this Case, if the Faith given be confirmed by an Oath. <690> As *M. Pomponius*, ⁶ the Tribune of the People, being bound by an Oath, tho' compelled by Fear, punctually performed what he had promised to *L. Manlius*.

VII. *A special Difficulty concerning Promises made to Subjects in respect of the Sovereign Power handled.*

VII. But a greater Difficulty than any yet mentioned may arise from the Legislative Power, and from that super-eminent Right over the Goods of the Subjects, with which the State is invested, and which the Sovereign exercises in its Name. For that Right, if it reach to all the Goods of the Subjects, why not then to that Right also derived from a Promise made in War? Which if granted, all such Covenants seem to be void, and so all Hopes of concluding a War, but by a compleat Victory, would be lost. But on the contrary we must observe, that this super-eminent Right is not to be promiscuously used, but only so far as the publick Good requires it in a civil Government, which, tho' monarchical and absolute, is not despotical. Now, this general Interest commonly requires, that such Agreements should be performed: Agreeable hereunto is what we have already ^a said of the Obligation of maintaining the present State of the Government. Add hereunto, where Necessity requires this eminent Right to be used, Satisfaction is to be made, as hereafter ^b shall be more fully explained.

^a *B. 2. Ch. 4. § 8. n. 3.*

^b *In the following Chapter, § 7.*

⁵ In this Temple Slaves, who were ill treated by their Masters, took Refuge, *Lib. XI. (Cap. LXXXVIII. p. 288. Edit. H. Steph.)*

⁶ He had sworn to the Son of *Manlius*, and not to himself, that he would desist from proceeding on the Accusation he had brought against the Father; and he declared in the Assembly of the People, that the Reason of his doing so, was because *Titus Manlius* had made him swear it, by threatening to kill him. *SENECA*, in relating this Fact, observes, that this young Man was the only Person, that found Means to restrain a Tribune of the People with Impunity: *Juravit Tribunus, nec fefellit; & causam actionis remissae concioni reddidit. Nulli alii licuit impunè Tribunalum in ordinem redigere.* *De Benef. Lib. III. Cap. XXXVII. GROTIUS.*

See also *CICERO* upon this Fact, *Offic. Lib. III. Cap. XXXI.*

VIII. I. Moreover Agreements may be confirmed by Oath, ¹ not only by King, or Senate, but by the whole Body politick; as *Lycurgus* bound the *Lacedemonians*, and *Solon* the *Athenians* by Oath to observe their Laws: And lest by the Change of the Persons the Oath should lose its Force, ² to renew the same Oath every Year. In that Case, there would be no receding from the Engagement, not even for the publick Advantage. For a State has Power to part with its own Right, and the Terms of the Treaty may be so plain, as to admit of no Exception. *Valerius Maximus* thus speaks to the City of *Athens*, ³ *Read the Law which you have sworn to observe.* The *Romans* ^a called such Laws sacred, which they were obliged to keep by Oath, as *Cicero* ⁴ says in his Oration for *Balbus*. <69I>

VIII. And it is shewn that such Promises may be confirmed by the Oath of the State.

^a See Manutius de Legibus.

VIII. (i) See my Observations upon PUFENDORF, *Law of Nature and Nations*, B. IV. Chap. II. § 17. Note 2. *Edit.* II.

2. See PLUTARCH upon this Head in the Lives of those two celebrated Legislators, p. 57. D. E. and p. 92. But there is no mention in that or any other Place, (that I know of) of renewing the Oath annually. On the contrary it seems, that such renewal was not thought necessary for continuing the Oath in all its Force, notwithstanding the Change of Persons. I find at least that DIONYSIUS HALICARNASSENSIS, a *Greek* Author, says expressly, that the Oath once taken by the Whole People was sufficient to make a Law irrevocable, even in regard to the Posterity of those, who had sworn to observe it. This is where he treats of *sacred Law*, of which more will be said in the following Notes. *Antiq. Rom.* Lib. VI. Cap. LXXXIX.

3. *LEGE itaque Legem, quae te jurejurando obstrictam tenet.* Lib. V. Cap. III. Num. 3. *Extern.*

4. GRONOVIVS criticises our Author in this Place. This is not CICERO's Thought, says he. The Orator confines himself to proving, that nothing is sacred but what the People have declared so: *Sacrosanctam enim nihil potest esse, nisi quod per Populum Plebemve sancitum est.* Orat. pro Balbo. Cap. XV. So that the Authority of the People was indeed necessary to the making a *sacred Law*: But every Law, to the Establishment of which the Interposition of the People was necessary, was not therefore *Sacred*, unless it implied, that whoever violated it, his Head should be forfeited to the Gods, so that any other Person might kill him with Impunity: For that is understood by *Caput sacrum sancire*, or *consecrare*. But this makes nothing against our Author. He never pretended, that the Reason, why a Law was called *Sacrata*, was only because it had been established by the Authority of the People. The Thought is too absurd to have entered into the Mind of GROTIUS, or for him to have ascribed to CICERO. He says expressly the contrary in his *Florum Sparsio ad Jus Justinian.* (p. 25, 26. *Edit.* Amstel.) *Erant autem Leges omnes sanctae, quae sanctionem haberent, at non omnes sacratae.* After which he cites the Definition of these *sacred Laws* from CICERO himself, in the fourteenth Chapter of the same Oration: And he adds there FESTUS (on the Words *Sacratae Leges sunt, &c.*) as also the Scholiast upon the Words of HORACE,

2. There is in the third Book of *Livy*⁵ a Passage agreeable to this, tho' of itself pretty obscure; where from the Opinion of several antient Lawyers, he declares, that the Tribunes of the People were sacred: But so were not the *Aediles*, Judges, nor *Decemviri*, and yet to hurt any of these was contrary to the Laws. The Reason of the Difference is, because the *Aediles* and the rest had no other Protection than that of the Law, that is, an Ordinance of the People, which could not be lawfully contravened, whilst it subsisted, but might be revoked by another posterior to it. Whereas the Inviolableness of the Tribunes was founded on the publick Religion, having been established by an Oath, which could not be revoked even by those who had sworn. *Dionysius Halicarnassensis* thus records it in his sixth Book: ⁶ *Brutus, calling an Assembly, proposed to the People, that the Tribunes might be rendred sacred and inviolable, not only*

Sanctarum inscitia Legum, (Lib. II. Sat. I. Ver. 81.) Our Author therefore intended only to say, that the People, in instituting this Kind of Laws, bound themselves to observe them by the Sanctity of an Oath, *religione obligabatur*: Words, to which the learned Critick ought to have attended, and which are taken from the Orator himself, upon whose Authority he founds his Opinion: *Qui, injussu suo, nullo pacto potest RELIGIONE OBLIGARI.—Quod PUBLICA RELIGIONE sanciri possit, id abest*. He says a little above, *Quod quum magis fide illius Populi, justitiâ vestrâ, vetustate denique ipsâ, quam aliquo PUBLICO VINCULO RELIGIONIS teneretur, &c.* Ibid. Cap. XV. So that it is not without Foundation, that our Author makes CICERO say, the People's Oath was necessary in these Sort of Laws: And we find in DIONYSIUS HALICARNASSENSIS, (*ubi supra* VI. 89.) that the most Eminent were attended with it; besides the Imprecation against the Head of all those who should violate them. See also FESTUS, at the Word *Sacrosanctum*. Whether they were called *Sacratae* for the one or the other of these Reasons, is a different Thing; and it does not appear clearly, that our Author intended to give the Etymology of that Word in this Place; At least CICERO, whom he cites, makes use of another Term, *Sacrosanctum*. It appears also by what FESTUS says at the Words *Sacratae Leges*, that even the Antients disagreed concerning this Etymology. The Reader may see upon this Question of Criticism, the *Animadversiones* of the late Mr. PERIZONIUS, p. 418, 419. and the Remarks of the same learned Man upon the *Minerva* of SANCTIUS, p. 761, 762. of the last Edition.

5. *Et quum religione, &c.* Lib. III. (Cap. LV. Num. 7. & seq.)

The learned GRONOVIVS does not think our Author's Reason well founded for the Difference between the *Tribunes of the People* and the *Ediles*, &c. The Truth is, says he, that no one could be considered as a sacred Person (*Sacrosanctus*) according to the Custom of the *Romans*, unless he was formally declared so by a Law, as the Tribunes had been, according to LIVY, *Lib. II. Cap. XXXIII.*

6. *Antiq. Rom.* Lib. VI. (Cap. LXXXIX.)

by the Law, but also by a publick Oath, to which they all agreed. Hence this Law was called *Sacred*. And therefore ⁷ that Fact of *Tiberius Gracchus*, in deposing *Octavius* from the Tribuneship, pretending that the Tribune's Power derived its Inviolableness from the People, but that this Privilege could not take Place in regard to the People themselves, was condemned by all good Men. Therefore (as I have said) both a State and a King may be bound by an Oath made to their own Subjects.

IX. But farther, a Promise ¹ made to a third Person, who has done nothing to extort it, shall be of full Force. But we shall not examine, wherein and how far that third Person may stand interested in it, being one of the Niceties ² of the *Roman Law*. For by Nature it is the Interest of all Men to consult the Advantage of others. Thus we read, ³ *That Philip having made Peace with the Romans, was denied the Power of treating the Macedonians ill, that in the War had revolted from him.*

IX. Or if a Promise be made to a third Person.

X. Moreover, as we have ^a already proved that mixt Governments sometimes exist, as a State may pass from one pure Form into another, so it may also by Covenant, or Agreement, pass into a mixt. So that they who before were Subjects, may become Sovereigns, or at least acquire a Part of the Sovereignty with the Right of defending it by force of Arms.

X. How the publick State may be changed.

^a B. 1. Ch. 3.

XI. 1. But a solemn War, that is, publick, and denounced on both Sides, among other particular Effects of external Right, has also this, that whatever Promises are made in that War, or for bringing it to a Conclusion, are so valid, that tho' they were occasioned by ¹ a Fear unjustly caused,

XI. That Fear in a solemn War by the Law of Nations is no just Exception.

7. As reported at large by PLUTARCH in his Life.

IX. (1) See above, B. II. Chap. XXV. § 8. Num. 3. and a Dissertation of OBRECHT, *De Sponsore Pacis*, § 3. Diss. VII. p. 151, 152.

2. See what the Author has said above, B. II. Chap. XI. § 18. Num. 1.

3. *Perseus* thought that the hardest Condition in the Treaty: *Una eum res, quum victo, &c.* LIVY, Lib. XXXIX. Cap. XXIII. Num. 6.

XI. (1) It is necessary in my Opinion to distinguish here, whether he who has compelled the other to treat by the Superiority of his Arms, had undertaken the War without Reason, or whether he could alledge some specious Pretext for it. If it was without any Cause, as *Alexander's* going to conquer remote Nations, who had never

yet they cannot be made void without the Consent of him to whom the Promise was made. Because as many other <692> Things, tho' in themselves not wholly innocent, are yet by the Law of Nations reputed just, so is Fear, ^a which in such a War is occasioned on either Side; for if it were not allowed, such Wars, that are but too frequent, could be neither moderated, nor concluded, which yet are very necessary to be done for the good of Mankind. And this we may reasonably suppose to be that Right of War, which ² *Cicero* says, must be kept with the Enemy; who

^a See the *Treatise De Compos. Pacis.*

heard of him, and of Consequence could not have done any Thing against him, nor owe him any Thing; or even if the Cause alledged be evidently a frivolous Pretext in the Judgment of every Man of common Reason: I do not see wherefore the Conquered should be obliged to observe the Treaty of Peace, any more than a Man fallen into the Hands of Thieves should be held to carry exactly, or pay at their Demand, the Money he had promised them as a Ransom for his Life or Liberty; which our Author himself does not pretend; tho' building upon false Principles, which we have rejected more than once, he is for having such a Promise to be valid in itself. But if the Conqueror had undertaken the War for some plausible Reason, tho' unjust at Bottom, when examined without Prejudice, in such Case the common Interest of Mankind undoubtedly requires, that some Difference be made between Promises extorted by Fear between private Persons, and those to which a Sovereign Prince or People is compelled by the bad Success of their Arms, tho' just. The Reason our Author uses in this Place is very good: And that without supposing a tacit Consent of Nations, which only renders the Engagement of the Conquered the stronger. For the Law of Nature itself which requires that Societies, as well as every Individual, should endeavour their Preservation, does by that alone make us regard not properly Acts of Hostility as just on the Side of the unjust Conqueror; but the Engagement of the Treaty of Peace as valid notwithstanding; so that the Conquered cannot dispence with observing it, upon the Pretext of the unjust Fear that occasioned it, which they might have done without the Consideration of the Advantage arising from thence to Mankind. This Interest of publick Tranquillity requires also, that even when a Treaty of Peace has been made, in Consequence of a War undertaken without Cause, or for one manifestly frivolous, the unjust Conqueror, who had no lawful Title, acquire it afterwards, in a reasonable length of Time, when the Conquered submit patiently to the Yoke, without being forced to it by the same Fear, which induced them to treat at first. See above, *B. II. Chap. IV. § 12. & seq.* To what I have said may be added the Reason alledged by PUFENDORF, *Law of Nature and Nations*, *B. VIII. Chap. VIII. § 1.*

2. *Est autem jus etiam bellicum, fidesque juris jurandi saepe cum hoste servanda.* *De Offic. Lib. III. Cap. XXIX.*

also tells us in another Place, ³ that an Enemy retained some Rights in War, that is, not only natural ones, but also some derived from the Consent of Nations.

2. Neither does it from hence follow, that he who has extorted such a Thing in an unjust War, may with a safe Conscience, keep what he has got, or compel the other Party to stand to his Covenants, whether sworn or not sworn. For internally, and in the very Nature of the Thing, it still continues unjust: Neither can this internal Injustice of the Act be taken away, but by a new and entirely free Consent of the Promiser.

XII. Further, whereas I have said that Fear is accounted just, which is caused in a solemn War, ¹ it is to be understood of such a Fear as the Law of Nations allows of. For Instance, if any Thing be extorted thro' the fear of Ravishment, or any other Terror, contrary to our Faith given, this ought to be adjudged by the Law of Nature, because the Law of Nations does not extend so far as to authorise any such Fear.

XII. *What is to be understood by such a Fear as is allowed by the Law of Nations.*

XIII. I. That Faith is to be kept even with those that are perfidious, I have already said, ² in treating of the Obligation of Promises in general; and it is likewise the Doctrine of ¹ St. *Ambrose*: Which doubtless extends to Enemies that are treacherous; such as the *Carthaginians*, with whom nevertheless the *Romans* inviolably kept their Faith. *Valerius Maximus*

XIII. *That Faith is to be kept even with the Perfidious.*

^a B. 2. Ch. 13. § 16.

3. The Passage has been already quoted above, *Chap.* XII. of this last Book, § 7. *Note* 8.

XII. (1) Thus a Promise extorted from an Ambassador made Prisoner is not valid, according to the Law of Nations. See *MARIANA, De Rebus Hispan.* Lib. XXX. *GROTIUS.*

The *Spanish* Historian speaks of *Antony Acunia*, Bishop of *Zamora*, whom *John D'Albret* the last King of *Navarre* had laid under an Arrest, and afterwards released upon his Promise to return, as soon as required. But that Prelate had not been received as Ambassador: And there were good Reasons not to receive him as such, as he had been present at the Battle of *Ravenna* between the *Spaniard*, and *French*, which latter were the King of *Navarre's* Allies. See *Chap.* XII. and XIX. of the Book referred to in this Note. So that the maxim, true in itself, is here misapplied. See what our Author says above, *B. II. Chap.* XVIII. § 5. and 6.

XIII. (1) *Quanta autem Justitia sit, &c.* *Offic.* I. 29.

says on this Subject, ² *The Senate regarded themselves, not those to whom they performed their Engagements.* And likewise *Salust*, ³ *In all the Punic Wars, tho' the Carthaginians in Time of Peace, and of Truce, were often guilty of most villanous Practices, yet they (the Romans) never returned the like to them, when they had an Opportunity.*

2. *Appian* speaking of *Servilius Galba*, who put the *Lusitanians* to the Sword for breaking their Alliance, after having deceived them in his Turn by a new Treaty, observes, ⁴ *He avenged one Treachery by another,* and to the Scandal of the *Romans*, imitated the *Barbarians*. The same *Galba* was afterwards accused for it by *Libo*, a <693> Tribune of the People; which *Valerius Maximus* ⁵ relating, thus censures it: *Compassion, not Equity, pleaded in that Cause; for the Absolution, which his own Innocency could not demand, was granted him in respect of his Children.* And *Cato* ⁶ writes in his Originals, he would certainly have suffered, if his Children and Tears had not interceded for him.

XIV. *Not if the Condition ceases, which happens when the other Party refuses to stand to his Part of the Agreement.*

XIV. But we must also observe, that there are two Ways, whereby to avoid the Crime of Perfidiousness, and yet not perform the Promise; namely, in Default of the Condition, or by Compensation. The Promiser is not properly discharged for Want of the Condition; but the Event shews, that there had been no real Obligation, since he did not intend to engage himself but upon Condition. To which we may refer this, ¹ if the other do not perform what he was bound on his Part to do first. For all the Articles of one and the same Agreement seem to be included one in the other, in the Manner of a Condition, as if it had been thus expressed, I

2. *Se tunc Senatus non eos, &c.* Lib. VI. Cap. VI. Num. 3.

3. *Item bellis Punicis omnibus, &c.* (Bell. Catilinar. in Orat. Caesar. Cap. L. Edit. Wass.)

4. *De Bell. Hispan.* p. 388. Edit. H. Steph.

5. *Misericordia ergo illam quaestionem, non aequitas, rexit: Quoniam quae innocentiae tribui nequierat absolutio, respectui puerorum data est.* Lib. VIII. Cap. I. Num. 2.

6. *Quod item apud Catonem scriptum esse [in Originibus] video, nisi pueris & lachrymis usus esset, poenas eum daturum fuisse.* De Orat. Lib. I. Cap. LIII. See also in Brut. Cap. XX.

XIV. (1) Compare PUFENDORF with this Place, *Law of Nature and Nations*, B. V. Chap. XI. § 9. and what our Author has already said, B. II. Chap. XV. § 15.

will do these Things thus; provided the other also do what he has promised. Therefore *Tullus*,² in his Answer to the *Albans*, calls the Gods to witness, [[which]] † of the two Nations had scornfully sent back the Embassadors reclaiming their own, that all the Miseries of War might light upon them. *Ulpian* observes,³ He shall not be held a Confederate, who has renounced his League, because some Condition, on which it was made, is not performed. For which Reason, when it is otherwise designed, this express Clause is usually added, if any Thing be done contrary to this or that Article, yet shall the rest be in full Force.

XV. We have elsewhere^a declared the Original of Compensation, that is,¹ when we cannot otherwise recover what is our own, or what is justly due to us, we may take from him, who either keeps what is ours, or is indebted to us, the full Value thereof in any Thing else; whence it follows, that we may much more keep what is actually in our Possession, whether corporeal or incorporeal. Whatever therefore we have promised, we need not perform, if it be of no greater Value than that of ours, which the other Part injuriously detains from us.² *Seneca* says in his sixth Book of Benefits, *Thus the Creditor is often cast by the Debtor, when he has upon some other Account taken more than the Value of his Debt. Nor does the Judge only sit between the Creditor and the Debtor, who may say to the Plaintiff, You lent your Money. What then? You now possess Land, which you never purchased, wherefore upon a just Valuation, depart you hence a Debtor, who came a Creditor.*

XV. Neither when there is a just Compensation opposed.

^a B. 2. Ch. 7. § 2.

2. *Nunciate*, inquit, *Regi vestro, Regem Romanum, &c.* (Livy, Lib. I. Cap. XXII. Num. 7.)

† [[The English text reads “whether” instead of “which.” This is a mistake on the part of the translator: the Latin is *uter*, “which (of two),” not *utrum*, “whether.”]]

3. *Digest*. Lib. XVII. Tit. II. *pro Socio*, Leg. XIV.

XV. (1) See PUFENDORF, *Law of Nature and Nations*, B. V. Chap. XI. § 5. & seqq. Our Author cites here in a Note the Passage of TERTULLIAN, where he says, that no one ought to object to a Compensation of good or ill on both Sides: *Nulli compensatio invidiosa est, in qua aut gratiae, aut injuriae, communis est ratio.* Scorpiac. adv. Gnosticos, Cap. VI.

2. *Sic Debitori suo Creditor, &c.* De Benefic. Lib. VI. Cap. IV.

XVI. *Tho' by another Contract.*

XVI. It will be the same Case, if he with whom I deal owes me as much, or more, upon any other Contract, and I cannot otherwise recover it. Indeed in Courts of Justice, *Seneca*¹ says, certain respective Actions of the Parties are not granted at the same Time; but this is a pure Effect of the Disposition of the civil Laws, to which we are bound to conform. Each Law has its Rights apart, which it has been thought proper not to mingle with those of other Laws; as the same² Author observes. But the Law of Nations allows no such Distinctions, provided there be no other Hopes of recovering our own.

XVII. *Or some Damage done.*

XVII. The same may be said, where he that exacts a Promise, owes nothing in Consequence of an Agreement, but hath damnified the Promiser.
¹ As the same *Seneca* testifies, *The Farmer is not bound to his Landlord, tho' his Lease be not cancelled, in Case he wilfully tramples down his Corn, or cuts down his Trees; not because he has received what he agreed for, but because he has prevented his Tenant's receiving whereby he might pay him.* Then he gives other Instances.² *You have driven away his Cattle, you have killed his Slave.*³ And again, *It is lawful for me to compare the good that a Man has done me, with the Hurt he does me, and then declare, whether I am more indebted to him, or he to me.*

XVIII. *Or for some Punishment due.*

XVIII. Lastly, whatsoever is also due by way of Punishment, may be balanced against the Thing promised. Which in the same Place of *Seneca* is at large explained.¹ *Thanks is due for a Kindness, and Revenge for an Injury. I neither owe him Thanks nor he Punishment to me, we are fully*

XVI. (1) If a Man, says he, has entrusted me with a Deposite, and afterwards stole something from me, I ought to prosecute him for the Theft, tho' he may Claim the Deposite from me by another Action: *Separantur actiones, &c.* Ibid. *Cap. V.* See the *Receptae Sententiae* of the Civilian JULIUS PAULUS, *Lib. II. Tit. XII. § 12.* and the Notes of CUJAS and Mr. SCHULTING upon him.

2. *Quae proposuisti, mi Liberalis, exempla, &c.* Ubi supra, *Cap. VI.*

XVII. (1) *Colonum suum non tenet, &c.* De Benefic. *Lib. VI. Cap. IV.*

2. These Words are in the Passage which I have cited above, § 15. *Note 2.*

3. *Beneficium nulli legi, &c.* Ubi supr. *Cap. VI.*

XVIII. (1) *Dedisti beneficium, &c.* Ibid. *Cap. V.*

discharged one of another. And again, ² By comparing the Benefits and Wrongs which I have received, I shall find whether there does not remain something due to me.

XIX. 1. But as amongst contending Parties at Law, if they have made any Agreement whilst the Suit is depending, none of them can compensate what he has promised, either by the Thing contended for, or the Costs and Damages of the Suit: So during the Continuance of the War, neither can that which first occasioned the War, nor the Damages allowed by the Law of Nations in War, be compensated. For the very Nature of the Engagement, which without that would be reduced to nothing, sheweth, that all the Disputes of War were set aside: Otherwise there could be no Agreement made so firm that might not be evaded. Whereto I may properly apply that Saying, ¹ of the same *Seneca*, whom I have cited so often, *Our Ancestors would allow of no Excuses, that Men might be assured that Faith was strictly to be kept. For it were better not to admit of an Excuse, tho' just, from a few, than encourage every one to make them.*

XIX. *How these take Place in War.*

2. But what is it then that may be compensated by the Thing promised? That which is due to us by any other Convention made during the War; or on account of the Damage done us by Acts of Hostility in the Time of Truce; or in Consequence of an Outrage committed on our Embassadors, or any other Action condemned by the Law of Nations.

3. But we must observe, that this Compensation be made between the same Persons, and that the Right of no third Person be injured; yet so that the Subjects Goods must stand engaged for the Debts of their own State by the Law of Nations, as I have said ^a elsewhere.

^a *B. 3. Ch. 3. § 2.*

4. To which we may add, it is the Part of a generous Soul to keep firm to his Treaties, even after Injuries received; on which Account that wise *Indian, Jarchas*, ² highly commended the King, who being injured by a

2. *Potius comparatione facta, &c.* Cap. VI.

XIX. (1) *Nullam excusationem receperunt, &c.* De Benefic. Lib. VII. Cap. XVI.

2. The King commended by *Jarchas* was named *Ganges*, whose Ally is said to have carried his infidelity so far, as to seize the Person of the Queen his Spouse. PHILOSTRAT. *Vit. Apollon. Tyan.* Lib. III. Cap. XX. *Edit. Olear.*

confederated Neighbour, *Would not break his Faith given, saying, That he had sworn so solemnly, that he durst not hurt the other, no not after great Provocation.*

^b 5. Now what Questions use to arise concerning Faith given to Enemies, may almost all of them be resolved, by the Rules we have established ^b above in treating of the Effect of Promises in general, and of the Oath that accompanies them in particular, of Alliances and publick Treaties, as also of the Right and Obligation of Kings, and the Interpretation of obscure or ambiguous Clauses. Yet that the Use of the Principles we have laid down may be better perceived, and to clear any Doubt that may arise hereafter, I shall not think much to point out some of those special Cases which are most remarkable, and most frequently occur. <695>

^b B. 2. Ch. II,
13, 15, 16.

*Concerning the publick Faith whereby
War is finished; of Treaties of Peace, Lots,
set Combats, Arbitrations, Surrenders,
Hostages, and Pledges.*

I. All Agreements between Enemies depend upon Faith, either expressed or implied. Faith expressed, is either publick or private. Publick is either of the supreme or subordinate Powers. That of the supreme Powers, either puts an end to the War or is of Force during its Continuance. Among those Things that conclude a War, some are looked on as Principals, some as Accessories. The Principals are those very Things that finish the War, either by themselves as a Treaty of Peace, or by Consent that it be referred to another Thing, as the Decision of Lot, the Success of a Battle, the Judgment of an Arbitrator; whereof the first is purely casual, but in the two others the Chance is moderated by the Strength of the Mind or of the Body of the Combatants, and by the Power given to the Judge.

I. The Division of Faith between Enemies, in order to what follows.

II. They who have Power to begin a War, have likewise Power to enter upon a Treaty to finish it; for every Man is the best Manager of his own Affairs; ^a whence it follows, that in a War on both Sides publick, it is wholly in their Power who enjoy the supreme Authority, which in a Government truly monarchical ¹ belongs to the King, unless there be any Thing that hinders him from exercising his Right.

II. The Power of making Peace is in the King, if the Government be Regal.

^a B. 2. Ch. 15. § 3.

II. (1) *In Statu vere regio*, says the Author. That is to say, if the King be absolute,

III. *What if the King be an Infant, Mad, a Prisoner, an Exile?*

^a See B. 1. Ch. 3. § 24.

^b Ch. 23.

III. ^a For if a Prince be not out of his Minority, (which in some Kingdoms is determined by Law, in others by probable Conjectures) or be not in his true Senses, he is not capable of making Peace. The same is to be said ¹ of a King that is a Prisoner, if his Kingdom had its first Rise ² from the Consent of the People; for it is not to be supposed, that the People would confer the Sovereignty upon one, with a Power even to exercise it at a Time when he is not Master of his own Person. Therefore in such a Case not the full Sovereignty, but the Exercise of it, and as it were the Guardianship is in the People, or him whom they shall delegate. But of those Things which are privately his own, whatsoever a King, tho' a Prisoner, shall Contract, will be valid, according to the Principles which we shall ^b establish concerning private Agreements. But what if a Prince be an Exile, ³ is it in his Power to make Peace? Yes ⁴ certainly, if it appear that he has no Dependence upon any Person. Otherwise his Condition would be little different from that of a Prisoner, for there are

and not obliged by the fundamental Laws of the Kingdom, to consult the People, or the Nobles of the State upon making War or Peace.

III. (1) See GUICCIARDIN, *Hist.* Lib. XVI. and Lib. XVIII. where he treats several Times of this Case. GROTIUS.

2. So that, according to our Author, when the Kingdom is patrimonial, the King, tho' a Prisoner, can make Peace, in the same Manner as he may treat validly in regard to his private Estates, tho' he holds the Kingdom only by an usufructuary Title. Our Author supposes without doubt, that the King, who is a Prisoner, is not become a Slave by the Right of War, or that he, who has taken him, either expressly or tacitly has renounced his Right. The question is otherwise useless, because Estates are acquired with the Person, according to what has been said above, *Chap.* VII. of this Book, § 4. and *Chap.* VIII. § 1. *Num.* 3.

3. What LUCAN says may be applied here, that during the Time the Dictator *Camillus* was at *Veii*, *Rome* also was there, tho' the *Gauls* were Masters of the City:

——— *Tarpeja sede perustâ*

Gallorum facibus, Veiosque habitante Camillo

Illic Roma fuit. ———

Pharsal. (Lib. V. Ver. 27. & seq.)

See CHASSANAËUS, *De Gloria Mundi*, Part V. Consider. IX. GROTIUS.

4. Our Author supposes here again without doubt, that the King has been unjustly expelled his Dominions. Otherwise, as he would be fallen from the Sovereignty, he would be equally incapable of making Peace, which is one of the most essential Parts of it.

Prisoners at large. *Regulus* refused to declare his Opinion in the Senate, ⁵ alledging, that as long as he was bound by an Oath to his Enemies, he could not rightly be a Senator.

IV. In an Aristocracy, or Democracy, the Power of making Peace shall be in the major Part: In the one of the Sovereign Council, in the other of the People <696> who have a Right to vote according to the Custom of the Country, as we have ^a said in another Place. Therefore Things thus agreed upon, shall be obligatory even upon those who dissented from them. As in *Livy*, ¹ *When it shall be once decreed, it must then be maintained as a good and profitable Alliance by all, even those who before were against it.* Also *Dionysius Halicarnassensis*, ² *It must be obeyed as just, whatsoever the Majority has decreed.* And *Appian*, *All are obliged to obey a Decree, and no Excuse to be admitted against it.* As also *Pliny*, ³ *What has pleased the most, must bind the rest.* But they may, if they please, make use of the Advantages of the Peace concluded against their Opinion.

IV. *In an aristocratical or democratical State this Power is in the Majority.*

^a B. 2. Ch. 5. § 17.

V. I. Now let us see what Things are subject to such an Agreement. Most Kings in our Days, holding their Kingdoms not as patrimonial, but as usufructuary, have no Power by any Treaty to alienate the Sovereignty in Whole, or in Part: Yea, and before they come to the Government, at what Time the People are their Superiors; ¹ such Acts may

V. *How the Sovereignty or any Part thereof, or the Goods of a Kingdom, may be alienated to obtain Peace.*

5. *Sententiam ne diceret, &c.* CICERO, *De Offic.* Lib. III. Cap. XXVII.

IV. (1) Which he makes *Aristenus*, Praetor of the *Achaeans*, say: *Ubi semel decretum erit, omnibus id, etiam quibus ante displicuerit, pro bono atque utili foedere defendendum.* Lib. XXXII. (Cap. XX. Num. 6.)

2. *Antiq. Rom.* Lib. XI. (Cap. LVI.)

3. *Singulos enim, integrâ re, dissentire fas esse: Peractâ, quod pluribus placuisset, cunctis tenendum.* Lib. VI. Epist. XIII.

V. (1) But tho' the Act of Alienation has not been previously declared entirely null, it is however no less so. The Nullity follows necessarily, from the King's Power being limited in that Respect by the very Nature of his Kingdom; and much more, if in conferring the Sovereignty, it was expressly stipulated, that he should not alienate any Part of it. It is a different Question to know whether the Alienation remaining without Effect, the King, as for his own particular Part[[,]] be not held to make the other contracting Party some Amends, admitting he can do so in a Manner not prejudicial to the Interests of his Subjects, or the State. See the following Note.

[[by]] † a fundamental Law, for the future be rendered absolutely void and null; so that even as to Damages and Interest, they shall be no ways binding. For it is probable, that Nations thought fit to ordain that ² in that Case, the other Party should have no Action against the King for Damages and Interest, since, if that took Place, the Goods of the Subjects might be seized, as answerable for the King's Debt; and so the Precaution that might have been taken to hinder the Alienation of the Sovereignty, would become entirely useless.

2. But that the entire Sovereignty may be firmly alienated, the Consent of the Whole Body of the People is required; which may be done by their Representatives, whom they call the Orders or States. And that any Part of the Kingdom may be firmly alienated a twofold Consent is required, both of the Whole Body, and especially of that Part which is to be alienated, which cannot be divided from the Body to which it was united against its Will. But yet in Case of extreme Necessity, and otherwise unavoidable, that very Part may firmly convey the Government over themselves to another without the Consent of the People, ³ because it is probable that Power was reserved, when civil Societies were instituted.

† [[The original English text reads "be," which is clearly a misprint—the Latin is *lege publica*, "by a public" (or fundamental) "law."]]

2. It suffices to say, that the other Party may, and generally do know, that it is not in the King's Power to treat: In which Case they can only blame themselves. The Reason alledged by our Author, may afterwards be put to account, but without its being necessary to found it upon a meer Supposition of a tacit Consent of Nations. For the rest, if we suppose that the Party, with whom the King has treated, could not know, that the Alienation was not in his Power; I see no Reason, why in such Case they may not have a Right to come upon the King's patrimonial Estate for Damages and Interest; in the same Manner as those, who have treated with a publick Minister, acting without Authority, may exact this Amends from him, according to the Principles laid down by our Author himself elsewhere, *B. II. Chap. XV. § 16. Num. 6.* But farther: In a doubt, or when the King has alienated some Part of his Kingdom, for very evident Reasons of Necessity or Utility, it may be presumed, that the People have given their Consent, according to what has been also advanced above, *B. II. Chap. VI. § 8. II. and Chap. XIV. § 12.*

3. See what has been said above, *B. II. Chap. VI. § 6, 7.* with the Notes.

3. But in patrimonial Kingdoms, nothing hinders, but that a King may alienate his Crown as he thinks fit. But it may happen to be so, that that King may not have Power to alienate any Part of his Dominion, as if he received it as his Propriety ⁴ upon Condition not to divide it. But as concerning those Things which are called the Goods of the Kingdom, they may become the King's Patrimony two Ways, either separably, or inseparably with the Kingdom; if this latter Way, they may be transferred, but not without the Kingdom; if the other, without it.

4. But those Kings, whose Kingdoms are not patrimonial, can scarcely be thought to have a Power to alienate the Goods of the Kingdom, unless it plainly appear by some fundamental Law or Custom, that has never been opposed, that such a Power was given them. <697>

VI. We have elsewhere ^a said, how far the People and the Successors may be bound by the Promise of a King; namely, ¹ as far as the obligatory Power is comprehended in the Sovereignty; which should neither be drawn out to an Infinity, nor confined within too narrow Bounds; but we ought to consider as valid in that Respect whatever the Sovereign engages himself to do for apparent Reasons. It is a different Thing, if a King be the absolute Lord of his Subjects, and his Rule be rather despotical than civil, ² as having brought them into Bondage by Conquest; or have obtained the Property of their Goods, without being Master of their Persons, as *Pharaoh* when he had purchased all the Land of *Egypt*, or as those who receive ³ Strangers into their private Lands. For in this

VI. *How far the People or Successors are obliged by a Peace made by the King.*

^a B. 2. C. 19. § 10, &c.

4. In which Case therefore he may indeed alienate the Whole Kingdom, but not a Part of it.

VI. (1) See REINKING. *B. I. Class. III. Cap. V. Num. 30.* and compare this with what has been said above, *B. II. Chap. XIV. § 7. and 12.* GROTIUS.

2. But see what we have said upon *B. I. Chap. III. § II. Num. 1.*

3. I add the Words, *upon this Condition*, which necessarily must be understood according to the Thought of our Author, who expresses himself clearly in another Place, where he has treated of the same Case: *Ut paterfamilias latifundia possidens, NEMINEM ALIA LEGE suas terras habitantem recipere velit, &c.* *B. I. Chap. III. § 8. Num. 2.* This gives me Occasion to defend him against a very sour and ill-grounded Criticism of the late Mr. COCCEIUS, in a Work published some little Time after his Death, intitled, *Autonomia Juris Gentium, &c.* He says there, (*Cap. XII. § 5.*) Our Author

Case, besides a regal Right, there accrues another Right, which renders an Engagement valid, which a bare regal Power of itself could not do.

VII. *The Goods of Subjects may by a Peace be granted away for the publick Good, but with Condition of repairing Losses.*

^a *Gail. 2. Obs. 57.*

^b *B. 1. Ch. 6. B. 2. Ch. 14. § 7. 8.*

VII. 1. This also is often disputed, what Right Kings have to dispose of the Goods of private Men to procure a ^a Peace, who have no other Power over the Goods of their Subjects, than as they are Kings. I have already ^b said, that the State has an eminent Right of Property over the Goods of the Subjects, so that the State, or those that represent it, may make Use of them, and even destroy and alienate them, not only upon an extreme Necessity, which allows to private Persons a Sort of a Right over Men's Goods; but for the publick Benefit, which ought to be preferred to any private Man's Interest, according to the Intention, reasonably presumed, of those who first entered into civil Society.

2. To which we must add, that the State is obliged to repair the Damages, sustained by any Subject on that Account, out of the publick Stock; so that he himself who hath sustained the Loss, contribute, if it be necessary, according to his Quota, to the discharge of that publick Debt. Neither shall the State be released from this Obligation, tho' at present it be not able to satisfy it, but whenever the State shall be in a Capacity, this suspended Obligation shall resume its Force.

supposes a Master of a Family, who, possessing a vast extent of Land, entertains a great Number of Servants and Workmen for the culture of them. This is not, adds he, a State, but a great Family; this Man is not a King, but a rich private Person: And GROTIUS confounds in this Manner the Head of a Family with an absolute Prince, which is *very absurd*. But is it not more absurd, to make so judicious a Man as GROTIUS say a Thing so contrary to the plain Sense of his Words, which import not a simple *Contract of Hire*, as it is supposed without Reason, but a Convention by which the Head of a Family in Question grants Lands, upon Condition that the Inhabitants of them shall acknowledge him for the future as their absolute Sovereign? He afterwards maintains, that admitting such a Convention, the new King would have no Right to alienate his Kingdom, and founds his Reason upon this, that there neither is nor can be, as is pretended, any patrimonial Kingdom. This is not the proper Place to examine the Reasons he brings for this Doctrine, nor to shew their Weakness. Besides, I have already said, *B. I. Chap. III. § 2. Note 4.* what we ought to think upon this Head, to avoid vicious Extremes.

VIII. Neither can I here generally admit the Opinion of *Ferdinandus Vasquius*, that a State is not obliged to repair such Damages caused by War, because the Right of War permits such Damages. For this Right of War, (as we have ^a elsewhere explained it) partly Respects other Nations, and partly those ^b that are at War among themselves; but it does not extend to the Members of the same State, who since they are closely associated, it is equitable, that they should esteem each Man's Loss, sustained on Account of the Association, ¹ as common to all; yet this also may be <698> constituted by the civil Law, that no Action may be brought against the State for Damages by War, ² in order to make every Man more ardent to defend his own.

VIII. *What of Things already lost in War.*

^a *B. 3. ch. 6.*

§ 3.

^b *Ch. 10. § 5.*

IX. There are some that place a vast Difference between those Things which are the Subjects by the Law of Nations, ¹ and those which are theirs by the civil Law; that they may allow the Prince a larger Right over these, even of taking them away without Cause or Satisfaction; but not so over the other: But falsely. For the Right of Property, whatever be the Title of it, has always its proper Effects by the Law of Nature itself; so

IX. *No Distinction here between Things got by the Law of Nations, and those by the civil Law.*

VIII. (1) There are some, who say, that War being deemed to be undertaken by the Consent of all the Citizens, every particular Person is also deemed to have exposed himself voluntarily to support all the Losses, which he may sustain in Consequence of the Acts of Hostility, especially in a War purely defensive; and therefore, that the State is not held to reimburse any one; unless it has received Advantage from what private Persons have lost, or unless the Damage was sustained by such Persons, in Consequence of the Hazards they run by Order of the Sovereign. For the Rest, it is so much the worse for those that have suffered, even tho' they have suffered more than others. But the Consequence is not just. This tacit Consent of the Citizens to the undertaking of a War, implies indeed a Will to suffer Loss, when they cannot do otherwise; but not if there be any way to make them Amends, either fully, or in Proportion to what they have suffered more than their Fellow-Citizens, who were equally obliged to it. The one does not hinder the other.

2. There may be another considerable Reason for this, which is the Difficulty of estimating, and comparing together the Losses of every one. Besides, if private Persons are rich, and the Publick poor, as it sometimes happens, this sufficiently excuses the State from making any Amends.

IX. (1) Compare this with what has been said above, *B. II. Chap. X. § 1. Num. 5.* and *Chap. XIV. § 8.*

that it cannot be taken away, but for such Causes as are naturally ² inherent in the Property, or such as arise from some Fact of the Proprietor.

X. *What is done by a King, is taken by Foreigners to be for a publick Good.*

X. But whether the publick Interest required that the Goods of the Subjects should be granted away by a Treaty, which a King ought not to do but for such a Reason, is a Question to be decided between the King, and the Subjects, as that of repairing Damages regards the State, and particular Persons. For to Strangers that contract with him the bare Fact of the Prince is sufficient, not only from the Presumption which the Dignity of his Person brings with it, but also from Law of Nations, which ^a allows the Goods of Subjects to stand obliged by the Fact of the King.

^a B. 3. ch. 2.

XI. *A general Rule for the interpreting Articles of Peace.*

XI. 1. But as to the true Understanding of the Articles of Peace, we must here observe, what has been said ^a before. The more favourable any Article is, the more largely it should be taken; and the less favourable it is, the more strictly it should be understood. If we consider the bare Law of Nature, there is nothing more favourable than what tends to this, that every one should enjoy his own. Which the *Greeks* express thus, ἕχαστον ἕχεν τὰ ἑαυτοῦ. Wherefore where the Meaning of the Articles is ambiguous, it should be taken in this Sense, that he that has the Justice of the War on his Side, should obtain what he took up Arms for, and also recover his Costs and Damages, but not that he should get any Thing farther by way of Punishment, for that is odious.

^a B. 2. ch. 16. § 11, 12.

2. But because in treating of a Peace it seldom happens, that either the one or the other of the Enemies owns he had been in the wrong; therefore in Articles of Peace, such an Interpretation should be admitted, as may according to the Justice of the War make the Balance ¹ even on

2. Our Author understands thereby the *eminent Domain* of the State, of which the lawful Use is founded upon the publick Utility, and consequently forms an Exception included in Property, as in every other Right of private Persons.

XI. (1) This is a natural Consequence of the Thing, or of the Intention of the contracting Parties reasonably presumed. For, as each believes himself in the Right, each no doubt is for making his Condition as good as he can, and at least as advantageous as that of the other Party. So that the Distinction of *favourable* and *odious*,

both Sides; which is generally done two Ways. For either it is intended, that those Things whereof the Possession has been disturbed by War, should be put on their antient Foot, (which are the Words of *Menippus* in his Oration, wherein he treats of the several Sorts of Leagues) or as the *Greeks*, say, ² ἔχοντες ἂ ἔχουσι, *That Things should remain as they are.*

XII. 1. Of these two Senses, in a doubtful Case, the latter is more readily presumed, because what it includes is more easy to be done, and it brings no Alteration. Hence *Tryphoninus* observes, that after the Peace such Captives only are to return by Postliminy, as are expressly mentioned in the Treaty, as we have proved elsewhere ¹ by invincible Arguments, in following the Correction of *Faber*. So Fugitives also are not to be restored, unless stipulated. ² For by the Law of War we <699> receive Deserters, that is, by the Law of War we are allowed to entertain, and list among our own Troops such as quit their own Party. All Things by such an Agreement continue his, who is possessed of them.

2. But that Word *possessed* is taken not civilly, but naturally; for in War a Possession in Fact is sufficient, neither is any other required. Lands, I have already ^a said, are then possessed, when they are inclosed by some Fortifications; for such as are only encamped upon for a Time, are not here respected. *Demosthenes* ³ in his Oration for *Ctesiphon*, says, that *Philip* made haste to possess all the Places he could possibly, knowing well that at the concluding of the Peace, he should keep all that he had

XII. *In doubtful Cases, it is believed that Things should remain as they are.*

^a B. 3. ch. 6.
§ 4

of which we have elsewhere shewn the Usefulness and Want of Solidity, is not more necessary in this Place.

2. See for Instance THUCYDIDES IV. 65. which I have already cited above, upon B. II. *Chap.* IV. § 8. *Num.* 3.

XII. (1) It is in *Chap.* IX. of this last Book, § 4. *Num.* 1. where the Law has been quoted. The Reader may see what I have said upon it, *Note* 3.

2. See the Law of the *Digest* quoted above at the End of *Chap.* I. of this Book. It is also sometimes agreed by Treaty of Peace, that such as would go over from one Party to the other, shall not be received. See the Articles of Peace concluded between the Emperor *Justinian* and *Chosroez* King of *Persia*, in the History of MENANDER the Protector, (Chap. II.) GROTIUS.

3. *De Corona*, p. 316. B.

in his Possession. But incorporeal Things ⁴ cannot be possessed, but either ^b by the Things to which they adhere, (as the Services of Manors) or by the Persons whose they are. ⁵ It is not however necessary to be Master of the Person, in order to possess this Sort of Things, when the Question is concerning a Right, which can only be exercised in the Country, which was formerly the Enemies.

^b See above,
Chap. 7. § 4.

XIII. *What if it should be agreed that Things should be restored to the same Condition that they were in before the War begun?*

XIII. In that other Kind of Agreement, whereby the Possession of Things disturbed by War, is to be restored, we must observe, that the last Possession immediately before the War is here meant; yet so as those private Persons that were then unjustly ejected, ¹ may have recourse to Justice, either to obtain a provisional Decree, whereby they may be put again in Possession, or to claim their Estate.

XIV. *Then they who were before*

XIV. But if a free People shall ¹ voluntarily submit themselves to either Party engaged in War, this Article of Restitution cannot reach them;

4. Consult PUFENDORF, *Law of Nature and Nations*, B. VIII. Chap. VI. § 19.

5. This is our Author's Meaning, whose concise Expression has been very ill understood by the learned GRONOVIVS. Suppose, for Instance, that a Person has the Use and Profits, or the Fief of a Land, if the Enemy seizes this Land, tho' he does not take the Lord of the Fief or Tenant Prisoner, as neither the one nor the other can exercise his Right but in a conquered Country, their Liberty is of no manner of Service to them; the Right then passes over to the Enemy, without the Person to whom it adhered, and becomes real from personal as it was before. So that, after a Treaty of Peace, this Sort of Goods continue, as well as others, to the Party who retains the Lands, to which they adhere.

XIII. (1) The Possession, here intended, is rather the Possession of a Country in general, than that of private Persons. So that in regard to private Persons, Things ought to stand upon the same Foot, as if the Possession had never been interrupted by War. And this would take Place, tho' it were even supposed, that the private Person in question has been unjustly dispossessed, in what manner soever, by a Subject of the other State, with which Peace has been concluded. For as this Injustice is supposed to have happened before the War, he who has suffered it, may demand Reparation in the same Manner as he might have done at first.

XIV. (1) But, says ZIEGLER, admitting even that such a People has not submitted to the Dominion of either Party, unless by Force or Fear, I see no Reason, why they can pretend to be reinstated in their first Condition, by Virtue of the Interpretation of that general Clause; especially if it is of no Importance to the other Party, whether that People be reinstated in the Possession of their Liberty or not. I answer for our

because it only relates to those Things which were done by Force, Fear, or otherwise by a Treachery not allowable but in regard to an Enemy. Thus though the Peace were concluded among the *Greeks*, the *Thebans* yet ² retained *Plataea*, pretending *That they were possessed of it, not by Force nor Treachery, but by the voluntary Surrender of the Inhabitants*. And by the same Right was *Nisaea* ³ retained by the *Athenians*. *T. Quinctius* used the same Distinction against the *Aetolians*, replying, *That was the Law of Cities taken by Force, but the Cities of Thessaly freely* ⁴ *submitted themselves unto the Roman Dominion*.

free, and have voluntarily submitted themselves, are not to be restored.

XV. If there be no Clause whereby it is otherwise agreed upon, it is to be supposed in every Peace, that no Action shall be commenced for Damages done in War; which also is to be understood of those done between private Persons, ¹ these being also the Effects of War. For in a

XV. Damages by War, if in doubt, are supposed to be forgiven.

Author, that he supposes here, as appears from the Examples which follow, a People who were the Ally of the contrary Party to that they have surrendered to, or who were concerned in some other Manner in the War: Otherwise the Question would be entirely impertinent. Now upon this Foot, such a People may well be included in the general Clause, according to which all Things are to be reinstated in their first Condition; if the State to whose Power they have submitted, have no other Title but an Act of Hostility; but not if they have submitted voluntarily: For the Clause in question regards only Acts of Hostility; and the Party, who has submitted voluntarily, has by that alone renounced all Benefit of a future Treaty of Peace.

2. THUCYD. *Lib. V. (Cap. XVII. Edit. Oxon.)* The Historian had already said the same Thing of the same City in another Place, *Lib. III. (Cap. LII.)* GROTIUS.

3. THUCYD. *Ubi supra V. 17.*

4. *Quae si maneret, captarum tamen urbium ea lex est. Thessaliae civitates sua voluntate in ditionem nostram venerunt. LIVY, Lib. XXXIII. Cap. XIII. Num. 12.*

XV. (1) That is to say, Damages caused to private Persons of the other State at War, by lawful Acts of Hostility; and not those, which private Persons may have occasioned of their own Head, or under the Pretext of War against the Subjects of the Enemy, or those of the same State. The late Mr. COCCBEUS in a Dissertation, *De Postliminio in Pace*, Sect. I. has advanced contrary to the Opinion of our Author, and several others whom he quotes; that by simply making Peace, the Parties do not hold themselves reciprocally discharged from the Damages occasioned on both Sides, and that an express Clause of general Amnesty is necessary to that Effect. He finds his Opinion on what follows. I. A Treaty of Peace, says he, is nothing more in itself than a Transaction upon what occasioned the War, and consequently upon a publick Interest, in regard to which if there be any Thing given up that concludes nothing in

Doubt, those who treat of Peace, <700> are presumed with Reason to do it on such a Foot, that there be nothing which supposes the one or the other guilty of Injustice.

XVI. *But not those before the War due to private Persons.*

XVI. Yet those Debts, which were due to private Persons at the beginning of the War, ¹ are not to be accounted forgiven, for these are not acquired by the Right of War, but only forbidden to be demanded in Time of War; therefore the Impediment being removed, *i.e.* the War ended, they retain their full Force. But tho' it ought not to be easily presumed, that what was a Man's Right before the War is taken from him, for this Cause chiefly (as *Cicero* ² well observes) Civil Societies were first constituted, that every one might keep his own, yet this must be understood of that Right, which is derived from the Inequality of Things.

respect to the Interest of particular Persons who have suffered Damage from the Enemy during the War. II. This Damage, adds he, ought naturally to fall only upon those, who had no just Cause for making War. Now in a Treaty of Peace, nothing is determined as to the Justice of the War, each continuing in his own Opinion as to that Point. III. From whence it arises, that the Right of *Postliminii* subsists even after such a Peace, according to *Law XII. of the Digest, Princ. De Captiv. & Postlim.* IV. It is to avoid this Inconvenience, that in Treaties of Peace, the Clauses, by which a general Amnesty is stipulated on both Sides, are so express and extensive. But this general Amnesty has a necessary Connection with the intent of a Peace, because the contrary might make Room for a new War. And the very Circumstance of not deciding upon the Justice of the Cause, proves, that the Damages, occasioned in Consequence of Acts of Hostilities, ought to be deemed by both Parties as justly sustained. The Law quoted is only a civil Law of the *Roman* People, upon a particular Case. See above, *Chap. IX.* of this Book, § 4. *Note 3.* and II. Nor does the last Reason prove any Thing, since Things are often expressed which could not fail of being understood, in which Case they are only recited for the Sake of greater Precaution.

XVI. (1) For Instance, if before the War, a Thing had been sold and delivered to some Merchant of the Enemy's Country, and that Merchant had not paid for the Goods. The Examples alledged by *GRONOVIVS* in this Place are entirely misapplied, because they suppose the Creditor and Debtor are both of the same State.

2. *Hanc enim ob causam maxime, ut sua tenerent, Respublicae Civitatesque constitutae sunt.* De Offic. Lib. II. Cap. XXI.

XVII. It is not so concerning the Right to Punishment; for this Right, as far as it concerns Kings, or People, is for this Reason presumed to be remitted; lest the Peace should not be compleat, if it left any old Grudges behind, which might in Time renew the War. Wherefore unknown Injuries are also comprehended in the general Terms, as the Action ¹ of the *Carthaginians* in drowning some *Roman* Merchants, was remitted by the *Romans*, before it was discovered to them, as *Appian* relates. *Dionysius* ² *Halicarnassensis* says, *Those are the best Reconciliations, which leave behind nothing of Resentment, or Ill-will.* And also *Isocrates*, ³ *After a Peace is concluded, it is base to remember former Injuries.*

XVII. *Punishments also before the War publickly due, if in doubt, are believed to be forgiven.*

XVIII. There is not the same Reason that private Men should be thought to remit the Right of demanding Punishment, because this may without War be judicially required; but since this Right is not ours in the same manner, as that, which arises from Inequality, and besides, Punishments having always something odious: The slightest Conjectures that may be drawn from the Terms of the Treaty, are sufficient to found a just Presumption, that this also is passed by.

XVIII. *What of the Right of private Persons to exact Punishment.*

XVII. (1) The Example is not well applied, says GRONOVIVS, here. For these Merchants were not thrown into the Sea before the Peace was concluded, but some time after the End of the first Punick War. So that, as soon as the Affair came to the Knowledge of the *Romans*, they were for avenging it as an Infringement of the Treaty, and declared War against the *Carthaginians*, who, to avoid it, gave them up *Sardinia*. But our learned Critick himself without Reason supposes, that the Question here relates to Things committed during the War, but unknown at the Time the Treaty of Peace was on Foot. There is no Difficulty in regard to Things of this Kind. For who can know all the Acts of Hostility, that have been committed during the Course of a War? So that by the Parties holding themselves reciprocally discharged from all the Mischief they have done each other during the War, they always understand, as well what they do not know, as what they do. The false Application of the Example therefore consists, only in the Crime of the *Carthaginians* not being committed before the War, but after the Peace made and concluded.

2. *Antiq. Rom. Lib. III. Cap. VIII. p. 138. Edit. Oxon.*

3. *Orat. Plataic. p. 299. Edit. Henr. Steph.*

XIX. *That Right which before the War was publickly claimed, but disputed, is easily presumed to be forgiven.*

XIX. But whereas we have said, that the Right, which we had before the War, should not easily be thought to be remitted, this indeed holds very true in the Right <701> of private Men. But as to the Right of Kings and Nations, a Remission may be more easily presumed, if the Terms of the Treaty, or probable Conjectures drawn from them, lead us to that Interpretation; but especially if the Right in question were not clear, but in dispute. For it is humane to believe that those who make Peace intend sincerely to stifle the Seeds of War. The same *Dionysius Halicarnassensis* well observes, ¹ *We are not so much to endeavour to patch up a broken Friendship for the present, as to take Care to prevent our being involved again in the same War. For we are met here not to put off the Miseries of War, but entirely to take them away;* which last Words are almost taken *Verbatim* from *Isocrates*, in his Oration concerning Peace.

XX. *Things taken after Peace to be restored.*

XX. Whatsoever is taken away after the Peace is absolutely concluded, is to be restored, for from that Time the Right of War immediately ceased.

XXI. *Some Rules of Agreement whereby Things taken in War are to be restored.*

XXI. But of those Articles which relate to the Restitution of Things taken in War, those in the first Place may be more largely interpreted, that are mutual, than ¹ those that concern only one Party. Next, those relating to Persons ² are more favourable than those that respect Things; and even among those that relate to Things, they that concern Lands ³

XIX. (1) *Antiq. Rom. Lib. III. Cap. IX.*

XXI. (1) It is, because then the Condition of the contracting Parties being unequal, there is great Reason to believe, that he, to whose Disadvantage the Inequality is, has pretended to engage himself as little as possible: And it was the other's Business, who was to have the Benefit of it, to have the Thing explained in as clear a Manner as possible.

2. Each Party ought, and generally does, Interest itself more in the Restitution of Persons than Effects. Hence, in a doubt, they are supposed to have intended, that the Prisoners should be restored, for Instance, before all other Things, animate or inanimate, moveable or immoveable.

3. Lands are commonly of much greater Value than moveable Things: And War is more frequently made for them. Hence it is supposed with Reason, that the former were more immediately the Object of Consideration than the latter.

are more favourable, than those that respect Moveables; and also among these, they that are in ⁴ Possession of the State, more than those of private Persons. And again, among those in the Possession of private Men, they are ⁵ more favourable, that are possessed under a gainful, than those under a chargeable Title, as Things bought with Money, and those held in Dowry by Marriage.

XXII. To whom any Thing is granted by Articles of Peace, to whom are also all the Profits allowed ¹ from the Time of that Grant, but not before; as *Augustus Caesar* well argued against *Sextus Pompeius*, who having *Peloponnesus* granted to him, would have also had all the Tributes that were in Arrears for some Years past, before the Time of that Grant.

XXII. *Fruits, to be restored.*

4. What the State has taken is also generally of much greater Value than what it has left to private Persons. Besides, it is more easy to be known.

5. It is plain, that the Restitution of this Sort of Things is more easily granted, since in restoring them, nothing is lost that might have been had without that.

XXII. (1) ZIEGLER has Reason to say, that if the Party, to whom a Thing is yielded up by the Treaty of Peace, had seized it before, during the War, he ought also to have the Revenues of it for the Whole Time it has been in his Possession, by the Right of War; tho' the Cession of it gives him a new Title. But the Thing is clear in itself, and our Author intended to speak only of the Case, in which there might be some Difficulty. When a Thing is yielded up, which we had in our Power, as we seem thereby to acknowledge, that those to whom we make such Cession had a Right to it, it also seems first, that we ought to restore the Revenues, which have arisen to us from it, from the beginning of the War to the Conclusion of the Treaty of Peace. But when we only leave the Thing to those who have taken it, the Question is evidently superfluous; because the Possession, supported by the Right of War, secures the Revenue to the Possessor. Nevertheless, in the former Case, the Cession of itself, if rightly considered, has no retroactive Effect with regard to the Revenues. For till the Treaty of Peace, by which the Cession was made, the Right to the Thing yielded up was in Dispute; so that the Party who gives it up, acknowledges no Right in the other, but for the Time to come, and by Virtue of the Cession alone which he makes to him, by a Kind of Transaction. For the rest, that our Author intended to speak solely of this Case, appears from the Example which he alledges. For *Sextus Pompeius* was not in Possession of *Peloponnesus*. APPIANUS ALEXANDRINUS, whom our Author cites in the Margin, speaking before of the Conditions of the Treaty made between *Octavius* and *Mark Antony* on the one Side, and *Sextus Pompeius* on the other, distinguishes clearly *Sardinia*, *Sicily*, the Island of *Corsica*, and some others, which *Pompey* held at that Time from *Peloponnesus*, which he was to have besides, p. 713.

- XXIII. *Of the Names of Countries.* XXIII. ¹ The Names of Countries are to be taken according to the present use, not so much of the common People, as of intelligent Persons, for such Affairs are commonly managed by Men of understanding. <702>
- XXIV. *Of Reference to some former Agreements, and of the Obstruction here.* XXIV. These two Rules are of frequent use, *viz.* as often as Reference is had to some precedent Article, or antient Treaty, so often the Qualities or Conditions expressed in the preceding Article or antient Treaty are supposed to be repeated; and he shall be reputed to have fulfilled his Agreement, who was willing to have done it, ¹ if he had not been prevented by the other, who quarrels with him on that Head.
- XXV. *Of Delay.* XXV. But whereas some affirm, that an Excuse is allowable for a short delay in the Performance, ¹ this holds not true, ^a unless caused by an unforeseen Necessity. For it is no wonder, that some of our Canons seem ² favourable to such Excuses, when it is their Design to exhort Christians to such Things as are agreeable to mutual Charity. But in this Question of the interpreting Agreements, we do not enquire what is most com-
- ^a See Albert. Argentin.

XXIII. (1) See FRANCIS GUICCIARDIN in the fifth Book of his History. GROTIUS. It will not be amiss to relate the Fact from this Historian in a few Words. *Lewis XII.* King of *France*, and *Ferdinand V.* King of *Spain*, had divided between themselves the Kingdom of *Naples*, after having expelled *Alphonso* King of *Aragon*. In this Partition *Terra-di labore* and *Abruzzo* were adjudged to the King of *France*; and *Pouilla* with *Calabria* to the King of *Spain*. A Dispute arose upon that about *Capitanata*, a small Country in the Kingdom of *Naples*. The *French* pretended, that this Country was Part of *Abruzzo*; and the *Spaniards* insisted, that it belonged to *Pouilla*. The first supported their Pretence by the antient Denomination, and the latter by the Custom of the present Times, established after the new Division which *Alphonso* had made of the Provinces. This gave Occasion to a great War between *France* and *Spain*.

XXIV. (1) Compare PUFENDORF with this Place, *Law of Nature and Nations*, B. V. Chap. XII. § 9.

XXV. (1) PUFENDORF gives good Reasons for this, *Law of Nature and Nations*, B. VIII. Chap. VIII. § 4.

2. Our Author has in View what the DECRETALS lay down with respect to *Emphyteote*, to whom they grant a small Delay, in regard to the Estates of the Church, after two Years have expired without his having paid Rent. See *Lib.* III. *Tit.* XVIII. *De Locat. & conducto, Cap. ult.*

mendable, nor what Piety or Religion demands, but what every one may be forced to do; in a Word what is merely of *external Right*, as we call it in Opposition to the Duty of Conscience.

XXVI. But where the Meaning is doubtful, the Interpretation ought to be rather made against him ¹ who imposes the Conditions, as generally the more powerful. ² *The Power is in him that gives, says Hannibal, not in him that desires Conditions of Peace*: As the Interpretation ought to be against the ³ Seller. For he can only blame himself, for not fully explaining himself; but the other receiving Conditions in Words capable of divers Senses, has a Right to take them in the Sense most favourable to himself; agreeable to which is that of *Aristotle*, ⁴ *When Friendship is contracted on the account of Interest, the Profit of the Receiver ought to be the Measure (of what is due)*.

XXVI. *In a doubtful Case the Interpretation is to be given against him that gives the Conditions.*

XXVII. It is also a daily Dispute, when a Peace may be said to be broken, which the *Greeks* call *παρασπόνδημα*; for it is not directly the same Thing, to give a new Occasion of War, and to break a Peace. But there is a great Difference ¹ between them, as well in regard to the Penalty which the Breaker incurs, as with respect to the Liberty of the injured

XXVII. *Distinctions to be made between new Occasions of War, and breaking the Peace.*

XXVI. (1) In this Case the strongest generally speaks first: But when Conditions are to be asked the weakest begins. Which *Sylla* told King *Mithridates*. PLUTARCH, in *Vit. Sull.* (p. 497. C.) GROTIUS.

2. *Est quidem ejus, qui dat, non qui petit, conditionem dicere pacis, &c.* [LIVY, *Lib. XXX. Cap. XXX. Num. 24.*]

3. This is determined by the *Roman Law*: *Veteribus placet, pactionem obscuram, vel ambiguum, Venditori, & qui locavit, nocere: In quorum fuit potestate, legem apertius conscribere.* Digest, *Lib. II. Tit. XIV. De Pactis, Leg. XXXIX.* It is indeed the Seller's Business to tell the Price of his Merchandize:

SA. *Indica, fac pretium.* DO. *Tua merx est, tua indicatio est.*

PLAUT: in *Pers.* (Act IV. Scen. IV. Ver. 37.) GROTIUS.

4. *Ethic. Nicom. Lib. VIII. Cap. XV.*

XXVII. (1) For when there is no Contravention to the Articles of the Treaty, tho' a new Occasion of War be given, the Penalty agreed on is not thereby incurred, which was to have taken Place on the Violation of any of the Articles: Nor is the Party offended discharged from his Engagements. However, as Mr. BUDDÆUS observes in his Dissertation *De Contraventionibus Foederum*, (Cap. III. § 4.) when a new Oc-

Party to disengage his Word in the other Articles of the Treaty. A Peace then may be broke three Ways, either by doing what is contrary to all Peace, or against that which is expressly mentioned in that Peace, or against that which is to be understood from the Nature of every Peace.

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XXVIII. *How a Peace may be broke by doing contrary to what is supposed to be in every Peace.*

XXVIII. First, It may be done, when that is acted which is contrary to all Peace; as when we are invaded in a hostile Manner, when there is no new Cause of War, which if it may be alledged with any Plausibility, it were better to suppose it an Act of Injustice without Treachery than with it. It seems almost unnecessary to mention that of *Thucydides*,¹ *Not they who repel Force by Force, but they who first offer the Violence, are the Break-*

casion of War given in this Manner, the Treaty of Peace is thereby broken indirectly; and with regard to the Effect, if Satisfaction for the Offence be refused. For then, the Offended having a Right to take Arms in order to do himself Justice, and to treat the Offender as an Enemy, against whom every Thing is lawful; he may also undoubtedly dispense with observing the Conditions of the Peace, tho' the Treaty has not been formally broken with regard to its Tenor. The same Author also very well observes, that this Distinction can scarce be of Use in these Days, because Treaties of Peace are conceived in such a Manner, that they include an Engagement to live in Amity for the future in all Respects; so that the least Occasion of War, how new soever it be, may be deemed an Infringement of the most important Article of the Treaty.

XXVIII. (1) (*Lib. I. Cap. CXXIII.*) A Deputy from the *Armenians*, in his Speech to *Cosroez*, King of *Persia*, said amongst other Things, as *PROCOPIUS* informs us, that they who break the Peace are not always the first in taking up Arms, but those who lay Snares for their Allies, even in the Time of the Alliance. *Persic. Lib. II. (Cap. III.)* The same Historian makes the *Moors* speak thus in another Place: "Those who break the Treaty of Peace are not such, as having received manifest Injuries, and made open complaint thereof separate from the Offender: But they are those, who making Profession of their Willingness to observe the Alliance, commit Violence however against their Allies, and thereby render GOD their Enemy. They are not People, who in breaking with an Ally, only carry off their own Effects; but such as by taking away those of others, reduce the lawful Proprietors to the Necessity of exposing themselves to the Dangers of War." *Vandalic. Lib. II. Cap. XI.* *AMMIANUS MARCELLINUS* relates, that in the Time of *Valentinian*, the *Romans* gave way on Purpose before the *Persians*, that they might not be the first in committing Hostilities, and thereby give Reason to believe, that they had broke the Alliance; so that they did not come to Blows, till the last Extremity: *Operâque consultâ retrocedentes, &c.* *Lib. XXIX. init.* *GROTIUS.*

ers of the Peace. This being granted, we must next see, who are the Invaded, and who by invading break the Peace.

XXIX. I find some are of Opinion, that if the Invaders be but their Allies, the Peace is broken. I do not deny but such a Contract may be made, not properly, that one Ally should be liable to Punishment for the Fact of another; but that the Continuance of the Peace may then be deemed to depend on a Condition, partly arbitrary, and ¹ partly casual. But it is scarce credible, that such a Peace should be made, unless it manifestly appear from the Treaty itself; for it is irregular, and inconsistent with the Design of those that make Peace. Therefore they that thus invade, without the Assistance of others, shall be adjudged the Breakers of the Peace, and it shall be lawful to make War on them, not on others; contrary to which, the *Thebans* formerly pleaded against the ² Associates of the *Lacedaemonians*.

XXIX. *What if we be invaded by Allies.*

XXX. But if Subjects commit any Violence without publick Order, we must then see whether this Act of private Men can be said to be approved by the State; to which three Things are required. 1. The Knowledge of the Fact. 2. A Power to punish. And 3. A Neglect in the Person authorised

XXX. *What if by Subjects, and how their Act may be judged approved.*

XXIX. (1) The Condition is partly arbitrary, (*potestativa*) as the Party, with whom the Peace is directly and immediately made, can contribute something, in some Manner or other to hinder his Allies from offending his antient Enemy. But it is casual, as he cannot absolutely hinder them from doing it, if they will not pay any regard to what he says or does for that End, and they are at the same Time in a Condition not to fear him. However as, from his having consented to the Rupture, in case his Allies should commit any Act of Hostility, he seems to have taken upon himself to hinder them from doing so; he has no Reason to complain, when that happens, even tho' he should have omitted nothing that depended on him. See further, upon the Division of Conditions into arbitrary, casual, and mixt, what PUFENDORF says in his Treatise, *Of the Law of Nature and Nations*, B. III. Chap. VIII. § 4.

2. That is to say, the *Plataeans*. For when the *Lacedaemonians* had broke the Peace by seizing treacherously the Citadel *Cadmea*, the *Thebans* believed they had a Right to seize the City of *Plataea*, under Pretext, that having been the Ally of the *Lacedaemonians*, the act of the latter included also a Rupture with it. See PAUSANIAS, *Lib. IX. seu Baeotic. Cap. I.*

^a B. 2. *Ch.* 21.
§ 2. & seq.

to do it; as you may easily gather from what has been ^a said before. 1. The Knowledge may be proved, if the Fact be notorious, or has been complained of. 2. A Power is presumed, unless there be a Rebellion. 3. A Neglect may appear, if the Time be elapsed, which every State generally takes to punish Offenders. And such a Neglect is equivalent to a publick Decree. Neither can what *Agrippa* says in *Josephus* [[¹]] be otherwise understood, *That the King of Parthia should look upon the Peace as broken, if any of his Subjects took up Arms against the Romans.*

XXXI. *What if
Subjects serve
under another
Prince?*

^a *Gel.* 1. 7.
cap. 3.

XXXI. Another Query is often made, whether it be all one, if Subjects take up Arms, not by themselves, but fight under others engaged in War. The *Cerites* in *Livy* clear themselves, by saying, their Subjects took up Arms without any publick Order. The same was the Defence of the ^a *Rhodians*. And indeed the best founded Opinion is, that such a Thing ought not to be deemed permitted, unless there are <704> apparent Reasons for believing that there was an Intention to permit it; as we see now that is sometimes practised, in Imitation of the old *Aetolians*, who accounted it lawful, ¹ *To plunder the Plunderer.* Which Custom *Polybius* says was so powerful, ² *That tho' they were not at War themselves, but only others, their Friends, or Allies, yet it was lawful for the Aetolians, without any publick Order, to fight on both Sides, and to prey on either Party.* And *Livy* gives the same account of them. *They suffer their Youth,* ³ *but without any publick Commission, to fight against their Allies, and often both Parties*

XXX. [[Footnote number missing in original, supplied from Latin edition.]] (1) It is in that Prince's Speech to the *Jews*, to exhort them to submit to the *Romans*: For in representing to them, that they had no Resource; he told them, that even tho' those of their Nation, who inhabited *Adiabene*, on the other Side of the *Euphrates*, should be willing to come to their Aid, the King of the *Parthians*, in whose Dominions they were, would not permit it. *De Bell. Jud.* Lib. II. Cap. XXVIII. (XVI. *in Latin.*) p. 808. B.

XXXI. (1) This might be expressed in *Latin* by the Words of *PLAUTUS*: *De praeda praedam capio.* In *Trucul.* (*Act* II. *Scen.* VII. *Ver.* 15, 16.)

2. He makes *Philip* King of *Macedon* say this, *Lib.* XVII. *Cap.* V.

3. [See the Passage cited above, *B.* II. *Chap.* XXV. § 9. *Note* 2.] The *Sabirian Huns* fought also sometimes on one Side and sometimes on the other, as *AGATHIAS* observes, *B.* IV. (*Cap.* III.)

have Aetolian Auxiliaries at the same Time. Thus the *Hetrurians*⁴ of old denied to assist the *Veientes*, but yet did not hinder their Youth from going of their own free Will into the Service.

XXXII. 1. Again, the Peace is said to be broken, not only when the whole Body of a State, but if any of the Subjects be forcibly invaded, unless upon Occasion of some new Cause of War. For Peace is made to the Intent that all the Subjects might live in Safety: The Treaty being an Act of the State for all the Members in general, and for each in particular. And if there be even a new Cause of War, it shall be lawful, tho' the Peace subsists, for every one to defend himself and his Goods, against those that attack him. For it is natural (as *Cassius* says) to repel Force by Force. Therefore this Right cannot easily be thought to be renounced amongst Equals. But it shall not be lawful to revenge ones self, or by Force to recover what has been taken away, unless Judgment be first denied us. For this may admit of some Delay, but that of none.

XXXII. *What if Subjects be injured, explained by a Distinction.*

2. ¹ But if Subjects make it their constant Practice to commit Outrages contrary to the Law of Nature, so that there be Reason to believe they do it wholly against the Will of their Rulers, and no Court of Judicature can reach them, such as are Pirates; we may both recover our Losses from them, and avenge ourselves on them by Force of Arms, as if they were surrendered to us. But to assault others that are innocent on that Pretence, is directly against the Peace.

XXXIII. 1. ¹ A forcible Invasion of our Allies also breaks the Peace, but it must be those ² that are comprehended in the Peace, as I have

XXXIII. *What if Allies? With a Distinction.*

4. *Sanguini tamen nominique & praesentibus periculis consanguineorum id dari, ut si qui juventutis suae voluntate ad id bellum eant, non impediunt.* Lib. V. (Cap. XVII.)

XXXII. (1) In this Manner *Augustus* passed Sentence in favour of *Herod* against *Syllaeus*. See *JOSEPHUS, Antiq. Jud.* Lib. XVI. Cap. XVI. *GROTIUS*.

XXXIII. (1) See *THUANUS, Hist.* Lib. LXV. upon the Year 1578. There is also something upon this Head, in *FRANC. HARAEUS, Hist. Brabant.* Vol. II. upon the Year 1556. *GROTIUS*.

2. But see what I have said, upon the Passage cited in the Margin.

^a B. 2. Ch. 16.
§ 13.

^a already shewn in the Case of the *Saguntines*. This the *Corinthians* alledge in *Xenophon*, [[³]] in his 6th Book of the *Greek History*, *We have all sworn to one another*. But tho' those Allies do not covenant for themselves, but others do it for them, it is still the same Thing, provided it fully appears that they have ratified it; but as long as it is not certainly known that they have done it, they are reputed as Enemies.

2. But the Case is different of the other Allies, who have neither been engaged in the War, nor comprehended in the Treaty of Peace; as also of ⁴ our Kinsmen and Relations, who are not under our Dependence; neither can an Assault upon them amount to the Breach of Peace. Yet it does not follow, (as we have ^b said before) that War may not be made on their account, but then it will be a new War and for a new Subject.

^b B. 2. Ch. 25.
§ 4.

XXXIV. *How a Peace may be broken by doing contrary to what is expressed in the Peace.*

XXXIV. The Peace is likewise broken, (as I have said already) by doing contrary to what is expressed in the Peace; where by doing is likewise comprehended, not doing what we ought to do, and when we should do it. <705>

XXXV. *Whether any Distinction is to be made between the Articles of Peace?*

XXXV. Neither can I here admit of any Distinction between the Articles of Peace, as if some were of greater Concern than others: For whatever is inserted in the Articles, ought to be regarded as important enough to be observed. But Goodness, especially Christian Goodness, will more easily forgive small Faults, particularly if they be repented of; as *Seneca* speaks,

3. [[Footnote number missing in original, supplied from Latin text.]] *Cap. V. § 37.* Edit. Oxon.

4. Our Author supposes reasonably, that those with whom we have this Kind of Ties, are not under our Dependence. For if the Injury is done, for Instance, to the Queen, or a Prince, the King's Son, not reigning himself elsewhere, it is the same as if offered to the King's Person. See BODIN, *De Republic.* Lib. V. Cap. VI. p. 951. *Edit. Francofurt.* 1622. The *Roman Law* considers an Injury received by the Wife or the Children, as received by the Husband or Father, and gives an Action to the latter in his own Name. See the *Receptae Sententiae* of the Civilian PAULUS, *Lib. V. Tit. IV. § 3.* and CUJAS and Mr. SCHULTING upon him; as also the JURISPRUDENTIA PAPIANEA of ANTHONY FAURE, *Tit. IX. Princip. II. Illat. XXII.*

¹ *Quem poenitet peccasse, paene est Innocens.*

Who repents of his Crime, is almost innocent.

But to secure the Peace the better, it would be well done ² to add to the ^a Articles of less Concern, this Clause, That the Violation of any of them shall not be sufficient to break the Peace, but they shall be first put to Arbitration, before recourse is had to Arms, which *Thucydides* ³ records was stipulated in the *Peloponnesian* Treaty of Peace.

^a See B. 2. Ch. 15. § 15.

XXXVI. And I am clearly of Opinion, that it is on that Foot we are to explain the Intention of the two Parties, when a particular ¹ Penalty is expressly added to the Violation of certain Articles; not that I am ignorant, that such an Agreement may be made, that it shall be in the injured Person's Choice, either to exact the Punishment, or make void the Accommodation. But the Nature of the Affair in question requires rather the other Interpretation, which I mentioned. This is also very plain, and what I have ^b *[[sic: a]]* said before, and proved by the Authority of History, that even in regard to Articles simply stipulated, he who fulfils not his Promise, when the other, who ought first to have executed his Engagements has failed therein, does not break the Peace; since his Obligation was conditional.

XXXVI. *What if some Penalty be added.*

^b *[[sic: a]] B. 3. ch. 19. § 14.*

XXXVII. But if an absolute Necessity occasion the Non-Performance of the Agreement, as if the Thing promised be lost, or taken away, or the doing of it be by some Means or other rendered impossible, the Peace shall not indeed be looked upon as broken; for (as I have said already) Peace does not use to depend upon a casual Condition; but the other Party shall have his Choice whether he had rather wait for the Perfor-

XXXVII. *What if hindered by absolute Necessity?*

XXXV. (i) SENECA, in *Agamemn.* Ver. 243.

2. See a fine Example of it in the Treaty of Peace between the Emperor *Justinian*, and *Cosroez*, King of *Persia*; as MENANDER *the Protector* informs us, (*Cap. II.*) GROTIUS.

3. *Lib. V. Cap. LXXIX.*

XXXVI. (i) As in the Treaty of Peace between the *Goths* and the antient *Franks*. See PROCOPIUS, *Gotthic.* Lib. I. Cap. XII. GROTIUS.

mance of the Promise, if there be any Hopes of a possibility of its being done, though late, or receive the full Value of it, or be discharged from any mutual Engagements answerable to this Article, or thought equivalent to it.

XXXVIII. *The Peace shall stand firm, if the injured Person be willing to it.*

^a B. 3. ch. 19.
§ 13.

XXXVIII. When there is even Treachery on one Side, it is certainly at the Choice of the innocent Party to let the Peace subsist; as *Scipio*^a did formerly after many perfidious Actions of the *Carthaginians*. Because no Man, by doing contrary to his Obligation, can thereby discharge himself from it. For though it be expressed, that by such a Fact the Peace shall be reputed as broken, yet this Clause is to be understood only in Favour of the Innocent, if he thinks fit to make use of it.

XXXIX. *How a Peace may be broken, by doing what is contrary to the Nature of every particular Peace.*

XL. *What comes under the Notion of Friendship.*

XXXIX. Lastly, We have said, that the Peace may be broken by doing what is contrary to the *Special Nature of the Peace concluded*.

XL. 1. Thus those Things that are done contrary to Friendship, do break that Peace which was contracted under the Condition of Friendship; for what the Duty of Friendship alone may require from others, ought also here to be performed by the Right of Covenant. And to this (tho' not to every Peace,¹ for there are some not on the same Account of Friendship, as *Pomponius* observes,) we may refer many of those Things, which Civilians advance concerning Injuries and Affronts done without force of Arms; and especially that of² *Tully*, *If any Thing be committed after a Reconciliation made, it shall not be accounted a Neglect, but an Offence, and not imputed to Imprudence, but Perfidiousness*; but even here also we are not to judge of it invidiously. <706>

XL. (1) *Nam si cum gente aliquà, neque amicitiam, neque hospitium, neque foedus amicitiae caussâ factum habemus, &c.* Digest, Lib. XLIX. Tit. XV. De Captiv. & Postlim. Leg. V. § 2. GROTIUS.

See what has been said above, B. II. Chap. XV. § 5.

2. *Post reditum in gratiam, si quid est commissum, id non neglectum sed violatum putatur, nec imprudentiae, sed perfidiae, adsignari solet.* Fragm. Orat. pro. Aul. Gabin. apud Hieronym. *Apolog. adv. Ruffin.*

2. Therefore an Injury done to a Relation, or a Subject, of him with whom a Treaty of Peace has been concluded, shall not be deemed as done to himself, unless there was a manifest Design to affront and insult him thereby. Which natural Equity the *Roman* Laws observe, in Regard to Slaves³ that have been cruelly handled; and Adultery and Ravishment shall be imputed rather to Lust than Hatred: And the invading another Man's Property, shall be reputed rather a new Act of Covetousness than of Treachery.

3. But cruel Threatnings, without some new Cause given, are inconsistent with Friendship; and hereto I will refer the Building of strong Places on the Frontiers, not so much for Defence as Offence, and an unusual raising of Forces, if there be just and apparent Reasons to think that they are prepared against him with whom we have made Peace.

XLI. 1. To¹ receive particular Persons as are willing to remove from one Prince's Territories into another's, is no Breach of Friendship; for this Liberty is not only natural, but has something favourable in it, (as we have said^a elsewhere). In the same Place I shall rank the Entertainment given to Exiles: For as I have^b before proved out of *Euripides*, the State has no Right over those whom they have banished. *Perseus* argues well

XLI. *Whether to entertain Subjects and Exiles be contrary to Friendship.*

^a B. 2. Ch. 5. § 24.

^b B. 2. Ch. 5. § 25.

3. *Si quis sic fecit injuriam, &c.* Digest, *Lib.* XLVII. *Tit.* X. De injuriis & famosis Libellis, &c. *Leg.* XV. § 35. See the same Title of the *Institutes*, § 3.

XLI. (1) The famous Legislator *Solon* ordained, that no Strangers should be received into the Number of the Citizens of *Athens*, but such as were banished for ever by their Country, or who came to settle at *Athens* with their whole Families, in order to follow some Employment. *PLUTARCH*, in *Vit. Solon.* (p. 91. E.) King *Perseus*, as *APPIANUS ALEXANDRINUS* relates, said, to justify his giving Refuge to Exiles, that it was the common Right of all Men. *Excerpt. Legat.* Num. 25. (p. 367. *Exc. Ursin.*) This common Right is often confirmed, or rendered more strong by Treaties. See the Peace made with *Antiochus*, in *POLYBIUS*, *Excerpt. Legat.* XXXV. and that made between the *Romans* and *Persians* according to *MENANDER the Protector*, (*Legat. Justin. Justinian. & Tiber. Cap.* II.) as also what *SIMLER* says on the Articles of the Confederacy of the *Swiss Cantons*. The *Aradians*, whilst the *Kings of Syria* made War upon each other, obtained this Condition by a Treaty; that they should be permitted to give Refuge to all *Syrians* who came to take it in their Country; but that they should not expel, or deliver them up against their Will. *STRABO*, *Geogr. Lib.* XVI. (p. 754. *Edit. Paris. Casaub.*) *GROTIUS*.

in *Livy*,² *To what Purpose is it to ordain one to be banished, if there were no Place allowed for his Refuge?* And *Aristides*³ calls, *To receive the Banished, a Right common to all Mankind.*

^c Ubi supra,
§ 24. See *Beza*,
l. 12.

2. But⁴ we have already^c proved, that it is not lawful to receive whole Towns, or any great Multitudes, who made a considerable Part of the State from whence they came: Nor those who are engaged by Oath, or otherwise, to continue in the Service, or under the Slavery of him whom they have quitted. But we have mentioned^d above, that the like hath been introduced among some People, by the Law of Nations, concerning those who have been made Slaves by the Chance of War; and also concerning the delivering up of such who are not banished, but fly from Justice, I have treated in^e another Place.

^d *B. 3. ch. 7.*
§ 8.

^e *B. ii. ch. 21.*
§ 3. &c.

XLII. *How War may be ended by Lots.*

XLII. To decide a War by Lots is not always lawful, but only then, when we have a full Propriety¹ in the Thing disputed for: For the State is more strictly oblig'd to defend the Lives, Chastity, and such like of

2. *Et hercule quid adinet cuiquam exsilium patere, si nusquam exsuli futurus locus est?* Lib. XLII. Cap. XLI. Num. 7.

3. *Orat. Leuctr.* I. p. 105. C. Vol. II. *Edit. P. Steph.*

4. See what is said upon that Place.

XLII. (1) ZIEGLER, and others after him, criticise our Author, without Reason, in this Place, from having taken his Thought wrong. They make him say, that the Method of Lots is only to be used, when the Parties have an absolute Propriety in the Thing disputed for. But had they duly considered the Sequel of the Discourse, they would have found, that GROTIUS never intended to say so. For he simply admits of a Recourse to Lots, when we are sensible of being too weak to resist, and he makes no Distinction there between the Things, of which the Sovereign has always full Power to dispose, as his peculiar Right, and those which appertain to the Subject, for the Defence of which he has undertaken the War. What misled the Interpreters, was the Expression of the Original, which is a little ambiguous: *Sortis aleae subjeci belli exitus licite non semper potest, sed tum demum quoties de re agitur, in quam plenum habemus dominium.* It seems at first Sight, that these Words, *sed tum demum, &c.* specify the Case excepted, in which the Method of Lots may be used: But here the *semper potest* is to be understood; for the Sense is, that it is only in Regard to Things of this Kind, that we always may, if we will, refer the Issue of a War to the Decision of Lots, even tho' we should do it in Circumstances, wherein it is not prudent to act in such a Manner; because every one may dispose of his own as he thinks fit. Whereas, when the Interest of the Subject is concerned, of which we are not absolute Masters, every other probable Means is to be tried, before we proceed to this, which is in its

the Subjects; and the King also is more strictly obliged to consult the Safety of the State, than to omit those Means which are most natural to his own and others Security. But yet, if he that is unjustly assaulted, shall, upon due Examination, find himself too weak to make any considerable Resistance, he may reasonably refer his Case to Chance, that by exposing himself to an uncertain, he may escape a certain Danger, which of the two Evils is the least.

XLIII. 1. Here follows a Question much controverted, *viz.* whether it may be lawful to decide a War by a Combat of one of each Side, ¹ as that of *Aeneas* and *Turnus*, ² *Menelaus* and *Paris*; or between two of either Party, as that between the *Aetolians* and *Eleans*; or between three of a Side, as between the *Roman Horatii* and the *Alban Curiatii*; or between three hundred on each Side, as that between the ³ *Lacedemonians* and *Argives*.

XLIII. *How by a set Combat, and whether it be lawful.*

2. If we only respect the external Right of Nations, no Doubt but such Combats are lawful, for that ⁴ Right gives a Man Leave to destroy his Enemy how he can; and if the Opinion of the old *Greeks*, *Romans*, and other Nations, were right, that every Man had an absolute Power over his own Life, then those Combats are likewise reconcilable to in-

Nature entirely uncertain. This is our Author's Thought. It is however not amiss to observe upon this Occasion, how much it concerns an Author, especially when he writes in a concise Stile, to express his Sense with all possible Plainness and Perspicuity: Otherwise he gives Room for such as do not examine Things with sufficient Attention, that is to say, the greatest Part of his Readers, to take his Words in a quite different Meaning from his own, and to ascribe Things to the Writer, which never once entered his Thoughts.

XLIII. (1) See *B. XII.* of *VIRGIL's Aeneid*, where the Combat is related at Length by the Poet, who, perhaps, invented it: For I know no other Authority for the Fact. There is nothing said of it in the little Treatise, *De Origine Gentis Romanae*, ascribed to *AURELIUS VICTOR*: He only says that *Aeneas* killed *Turnus*.

2. This is related in the third Book of the *Iliad*.

3. This Fact is in *THESEUS*, an antient Author, cited by *STOBAEUS*, *Serm. VII.* See the *Miscellanea Laconica* of *MEURSIUS*, *Lib. IV. Cap. XIII.*

4. See above, *Chap. IV.* of this third Book.

^a B. 2. c. 19.
§ 5. *and* c. 21.
§ II.

^b B. 2. c. 1.
§ 12. *&c.*

ternal Justice. But we ^a have several Times said, that this Opinion is repugnant to right Reason and GOD's Commands. We have ^b elsewhere proved ⁵ by Reason, and the Authority of Holy Scriptures, that he offends against Charity who kills a Man, for those Things which he can well spare. To which we shall add, that he who sets so small a Value upon his Life, which GOD hath given him as a great Blessing, sins against GOD and his own Soul. If the Thing disputed for be worthy of a War, as the Preservation of the Lives of many innocent Persons, we ought to endeavour it to the utmost of our Power; but to make use of a set Combat, purely as the Trial of a good Cause, or as an Instrument of Divine Judgment, ⁶ is vain and superstitious.

3. There is but one Thing that can render such a Combat innocent and lawful, and that but on one Side, ⁷ when otherwise it is highly probable that he who prosecutes an unjust Cause should be the Conqueror, and thereby cause the Destruction of many innocent Persons; he cannot then be any Ways blamed, who undertakes a Combat on this Account, wherein he has most probable Hopes of Success. And this is also true,

5. All these Reasons (says Mr. BUDDAEUS, *Jurispr. Histor. Specim.* § 23.) either prove nothing, or prove at the same Time, that it is never lawful to venture one's Life in a Combat of any Kind whatsoever. And this is what GRASWINCKEL has before asserted in his Defence of our Author against FELDEN, p. 259. See what I shall say presently, in *Note 7*.

6. This was a superstitious Custom of the antient *Germans*, who called this Kind of Combats *Judicia Dei*, or *Ordalia*. See FRANCIS HOTOMAN, *Obs.* III. as also the Dissertation of Mr. BUDDAEUS, cited in the foregoing Note, § 25. that of Mr. HERTIUS, *De Consultat. Legg. & Judiciis in Specialib. Rom. Germ. Imp. Rebuspubl.* § 21. Vol. II. Opusc. 459, 460. and one of Mr. SLICHER's, intitled, *De debita ac legitima Vindicatione Existimationis, &c.* Printed at *Amsterdam* in 1717. p. 37. & seq.

7. This Exception shews that the Thing is not bad in itself, and that all the Harm consists in exposing our own, or the Life of others, without Necessity to the Hazard of a single Combat, which would be unlawful, even tho' done without any Agreement. The Desire of terminating War, which has always such fatal Consequences, even to the victorious Party, is so laudable, that it may even excuse, if not intirely justify, those who engage, either themselves or others, imprudently in a Combat of this Nature. At least it seems to me, that in such Case, those who combat, not merely of their own Will, but by the Order of the State, are entirely innocent; for they are no more obliged to examine, whether the State acts prudently or not, than when they are sent upon an Assault, or to fight a pitched Battle.

that many Things which are not rightly done, may be by others, tho' not really approved, yet permitted, in Order to prevent greater Mischiefs, that <708> could not otherwise be avoided; as in many Places ⁸ Usurers and Prostitutes are tolerated.

4. What therefore we have ^c said before, when we treated of the Means of preventing a War, if two Persons that dispute about a Kingdom, are willing to try it by single Combat, the People ⁹ may safely allow it, that a greater Calamity which threatens them may be prevented: We may say the same, when it is to conclude a War; as *Cyrus* ¹⁰ challenged the *Assyrian* King. And *Metius*, in *Dionysius Halicarnassensis*, ¹¹ declares, that it is not unreasonable, if the Dispute be not concerning the Power and Dignity of the Nation, but of the Princes themselves, ¹² that they only should decide the Controversy by their own Swords. Thus we read, that the

^c See B. 2.
ch. 23. § 10.

8. But there is a great Difference between these Examples and the Case in Question. When Usurers and Courtesans are tolerated, that Toleration of itself implies no Approbation; it is a simple Impunity, which the Law and Magistrates may, and ought often to grant, in Regard to several vicious Things. But set Combats are, by their Nature, such as could have no Effect, without being positively authorised by the State: So that if our Author's Reasons were good, the State never could, I do not say decree such Combats of their own meer Will, but even permit Champions to fight them, who should offer themselves for that Purpose; because that Permission implies always an Approbation, and is adequate to an express Order.

9. See the foregoing Note.

10. As *Hyllus* long before challenged *Eurystheus*. See EURIPIDES in the *Heraclidae* ver. 804, & seqq.

11. *Antiq. Rom.* Lib. III. Cap. XII. It appears by what follows, that the Question is not at all determined by our Author's Principles and Reasons. For the *Alban* General refuses the Combat of one to one, and chooses rather that three should fight with three; because, says he, the Number *Three* includes, *a Beginning, a Middle, and an End.* Which is fine Morality.

12. Thus the *Adrianopolitans* answered *Mahomet*, concerning himself and *Musa Zeleb*, as LEUNCLAIVUS relates, *Lib. XI.* In like Manner *Cunibert*, King of the *Lombards*, challenged King *Alachis*. PAUL. WARNAFRED. *Lib. V.* So *Pharnacus* challenged the General of the *Sauromatae*, to try which of them should have the Fortress of *Cherso*, that their Dispute might not expose a great Number of People to the Dangers of War. CONSTANTINE, *Porphyrogonnet.* Cap. *De Castro Chersonis.* See an Example of a single Combat for a Kingdom, in PONTANUS's History of *Denmark*, (Lib. V. p. 151. *Edit. Amstel.* 1631. where the Champions were *Edmund Ironside* and *Canute*) and what Historians say of the Challenges which passed between the Emperor *Charles V.* and *Francis I.* King of *France.* GROTIUS.

Emperor *Heraclius* sought a single Combat with *Chosroez*, Son to the King of *Persia*.

XLIV. *Whether the Fact of the King does here oblige the People.* XLIV. They who thus refer their Cause to the Trial of a Combat, may indeed lose their own Right, if they have any, to the Kingdom disputed for; but they cannot make over a Right to another, who has none of his own, to those Kingdoms which are not patrimonial. Therefore to make the Agreement valid, there is a Necessity to have the Consent ¹ of the People, and of Persons already born, that have any Right to the Succession. And even as to Fiefs ² that are not free, the Consent of the Lord, or Superior, is absolutely necessary.

XLV. *Who is to be judged the Conqueror.* XLV. 1. Often in such Combats it is disputed ¹ which is the Conqueror. They cannot be reputed conquered, unless the whole Party on one Side be slain or put to flight. ² So in *Livy*, he that retreats within his own Borders, or into his own Towns, is to be esteemed vanquished.

2. Those three famous Historians, *Herodotus*, *Thucydides*, and *Polybius*, furnish us, each of them, with an Example of Disputes concerning

XLIV. (1) Some Commentators say, that this Consent is not necessary, because the King of a Kingdom, not patrimonial, having a Right to make War and Peace, has also, by necessary Consequence, that of terminating War in such Manner as he shall judge most conducive to the Good of the Publick. But the Consequence is not just: For as the fundamental Laws, or rather the Nature of a Kingdom not patrimonial, deprive the King of the Power to alienate validly the Crown, by his sole Consent; by that alone, I say, the Right of making Peace includes an Exception of the Case, in which the Alienation of the Kingdom would be concerned.

2. *In feudis non liberis*. Our Author uses here the Distinction of *Fiefs free and not free*, in an improper Sense, as he has done elsewhere. See what I have said *B. I. Chap. III. § 23. Num. 2.*

XLV. (1) There is a Verse of ENNIUS which says, that to be really Victor, even when victorious, it is necessary the Vanquished should confess it.

Qui vicit, non est victor, nisi victus fatetur

See SCALIGER upon FESTUS, at the Words *Herbam do*. GROTIUS.

The Passage of ENNIUS is in the Collection of HIERONYMUS COLUMNA, p. 133. *Edit. Amsted.* where the Note of that Commentator may be seen.

2. *Pulsique quum in fines suos se recipissent* [Aequi] &c. Lib. III. Cap. I. Num. 12. *In oppida sua se recepere, uti sua popularique passi*, &c. Ibid. Cap. II. Num. 10.

Victory. The Case related by the first, respects only set Combats; but he that rightly considers the Matter will find, that in all those Combats neither Party had a real Victory. For <709> the *Argives* were not put to flight by *Othryades*, but marched off in the Night, supposing themselves Conquerors, and with a Design to carry the News to their Countrymen. Neither did the *Corcyreans* defeat the *Corinthians*; but the latter, after having fought with Advantage, seeing a strong Fleet of the *Athenians* near, without hazarding an Engagement with them, retreated in good Order. Lastly, *Philip* the *Macedonian* had indeed taken a Ship of *Attalus*, forsaken by those of her own Party, but did not rout the whole Fleet: Therefore, (as *Polybius* observes) he rather behaved himself like a Conqueror, than really thought himself so.

3. But those Things, as gathering the Spoils, ³ giving Leave to bury the Dead, and offering Battle a second Time; which, both in the above-mentioned Authors and in *Livy*, you may find set down as Tokens of Victory, prove nothing of themselves, but as they may be attended with other Indications of the Enemy's Flight. And certainly, in a Doubt, the strongest Presumption is, that he who retreats runs away; but where there are no positive Proofs of Victory, the Case is just as it was before the Battle, and so they must either pursue the War, or come to a new Agreement.

XLVI. I. *Proculus* ¹ tells us, that there are two Sorts of Arbitrations, one whereof he makes so absolute, that its Sentence must be obeyed, whether just or unjust; which, he says, takes Place when the Arbitration is founded on a Compromise. The other is, when the Judgment ² of the

XLVI. *How War may be ended by Arbitration; and here Arbitration to be*

3. PLUTARCH says, this Permission, demanded by the *Thebans* after a Battle, assured the Victory to *Agesilaus*. In *Vit. Agesil.* (p. 606. B.) The same Historian observes elsewhere, that those who had obtained Permission to bury their Dead, were deemed, according to the received Custom, to have renounced the Victory, and could not erect a Trophy. In *Vit. Niciae*, (p. 527. A. B.) GROTIUS.

XLVI. (i) *Arbitrorum enim genera sunt duo, &c.* Digest. Lib. XVII. Tit. II. *Pro socio*, Leg. LXXVI.

2. These Arbitrators, according to the Ideas of *Roman Law*, are generally chosen by the Parties, to judge and determine something relating to the Engagements of a Contract; whereas the former are taken to terminate a Quarrel.

*understood
without
Appeal.*

Arbitrator has Force only so far as is conformable to what an honest and equitable Person ought to pronounce. Of which we have an Example in the Decision of *Celsus*,³ *If a Slave made free shall swear (says he) to do what Services his Patron shall require of him, the Demands of his Master shall be no farther obligatory than consists with Reason and Equity.* But this Interpretation of an Oath, tho' it may have been allowed by the *Roman* Laws, yet it is not agreeable to the plain Sense of the Words simply taken; but this holds very true, that the Word *Arbitrator* may be taken in both Senses, either as a Mediator only, such as were the⁴ *Athenians*, between the *Rhodians* and *Demetrius*; or for an absolute Judge, whose Decree must be obeyed. And it is in this Sense that we here take it; as also we have^a done before, when we treated of the Means to prevent a War.

^a B. 2. c. 23.
§ 8.

2. Tho' even against such Arbitrators, to whose Judgment both Parties have promised to stand, it may be provided by the Civil Law, as in some Places it is, to appeal from it, and exhibit Bills of Complaint;⁵ yet this cannot be between Kings and Nations. For here can be no superior Power, which may either hinder or disannul the Obligation of a Promise, so that their Sentence must stand, whether just or unjust; to which we may rightly apply that of *Pliny*,⁶ *Every Man makes him the supreme Judge of his own Cause, whom he has chosen Umpire.* For it is one Thing to

3. *Si Libertus ita juraverit, &c.* Digest. Lib. XXXVIII. Tit. I. *De operis Libertorum*, Leg. XXX. See CUJAS, upon Law XLIII. of the Title of the *Digest. De verborum obligationibus*, Vol. I. Opp. Edit. Fabrott. p. 1224. & seq.

4. See PLUTARCH, in the Life of *Demetrius*, p. 899. A.

5. See MARIANA, *Hisp. Lib.* XXIX. 15. BEMBO, *Lib.* IV. [Fol. 62. where he treats of an Arbitration between the *Florentines* and *Venetians*, in which the latter had made choice of *Hercules*, Duke of *Ferrara*, for their Arbitrator.] There are many Examples of Treaties of Peace concluded by the Means of Arbitrators in CROMER's *Hisp. Polon.* Lib. X. XVI. XVIII. XXI. XXIV. XXVII. XXVIII. There are also some in PONTANUS's History of *Denmark*, Lib. II. See also those we have cited above, B. II. Chap. XXIII. § 8. GROTIUS.

6. *Adeo summum quisque caussae suae judicem facit, quemcumque elegit, &c.* Hist. Nat. Praefat.

Our Author undoubtedly supposes that there is neither Fraud nor Collusion on the Side of an Arbitrator. See PUFENDORF, *Law of Nature and Nations*, B. V. Chap. XIII. § 4. with which Place it is necessary to compare this whole Subject.

speak of the Duty of an Arbitrator, and another of the Obligation of those who have engaged by Promise to stand to their Arbitration. <710>

XLVII. We must consider, in the Duty of an Arbitrator, whether he be chosen under the Notion of a Judge, properly so called, or whether a more extensive Power be given him, which, according to *Seneca*, is in some Manner essential to every Arbitration. ¹ *A good Cause*, says he, *had better be referred to a Judge than an Arbitrator, because the Judge has a constant Rule and Orders to proceed by, which he must not transgress; but the other having full Liberty to judge according to his Conscience, may re-trench or add something, and pronounce Sentence, not according to the rigorous Laws of Justice, but as Humanity and Piety shall direct.* And *Aristotle* ² reckons it, *The Duty of an honest Man, rather to go to an Arbitrator than a Judge; giving this Reason for it, For an Arbitrator respects that which is equitable, the Judge that which is legal; and for that Purpose the Use of Arbitrators was invented that Equity may prevail.* For *Equity*, in this Place, does not properly signify, as elsewhere, that Part of Justice which restrains the Generality of the Terms of a Law, according to the Intent of the Law-maker, (for even this is the Judge's Charge) but every Thing which is better done than not done, tho' not according to the strict Rules of Justice, properly so called. But such Arbitrators, as they are frequent among private Persons, that are Subjects to the same State; and are particularly recommended to Christians, by the Apostle *St. Paul*, *1 Cor.* vi. so, in doubtful Cases, so large a Power is not supposed to be granted them. For when there is any Obscurity, we are to follow ³ that Side which gives the least Extent to the Things in Question. But especially this is to

XLVII. *Arbitrators in doubtful Cases bound to the Equity.*

XLVII. (1) *Ideo melior videtur conditio causae bonae, si ad Judicem, quam si ad Arbitrum mittitur, &c.* *De Benefic. Lib. III. Cap. VII.* But the Ambiguity of the *Latin* Word *Arbiter* misled our Author in this Place. Arbitrators, properly so called, are not meant here, but real Judges, who in Affairs *bonae fidei*, as the *Roman* Law expresses it, were to determine according to the Maxims of Equity, and not according to the Rigour of the Law, as I have observed elsewhere. See Mr. *NOODT's* Treatise, *De & Imp.* Lib. I. Cap. XIII.

2. *Rhetoric.* Lib. I. Cap. XIII. *in fin.*

3. *Semper in obscuris, quod minimum est, sequimur.* *Digest, Lib. L. Tit. XVII. De divers. Reg. Jur. Leg. IX.*

be observed between sovereign Princes, who having no common Judge are presumed to tie up the Arbitrator to those strict Rules which Judges are generally confined to.

XLVIII. *Arbitrators ought not to judge of Possessions.*

XLVIII. But this is to be observed, that Arbitrators chosen by a People, or sovereign Power, ¹ are to give Sentence of the principal Matter, but not of the Possession, ² for Judgments of Possessions belong to the Civil Law: By the Law of Nations, the Right of Possession follows Property; therefore till the Cause is tried, no Innovation is to be made, both to avoid Prejudice, as also because the Recovery of those Things is difficult. *Livy*, in his History of the Arbitration between the *Carthaginians* and *Masinissa*, says, ³ *The Deputies did not change the Right of Possession.*

XLIX. *How far the Force of a pure Surrender extends.*

XLIX. 1. There is another Way of submitting to the Judgment of one in Order to terminate the War, which is to give the Enemy a full Power to dispose of us; whereby ¹ we surrender at Discretion, and become subject to him to whom we surrender. The *Greeks* call it † ἐπιτρέπειν τὰ καθ' αὐτόν. Thus the *Aetolians* were asked, in *Livy*, whether they would submit themselves to the Discretion of the *Romans*. This was the Advice of *L. Cornelius Lentulus*, as related by *Appian*, about the End of the second *Punic War*, concerning the Affairs of the *Carthaginians*. ² *Let the Carthaginians, says he, surrender at Discretion, as the Conquered use to do, and as others have done formerly; then we shall see what we have to*

XLVIII. (1) This the Duke of *Savoy* said, in the Dispute which he had concerning the Marquisate of *Saluzzes*. See *DE SERRES*, [or rather the Continuator of his Work] in the Reign of *Henry IV.* *GROTIUS*.

2. But see what I have said in the Chapter of *PUFENDORF*, cited § 6.

3. *Eodem anno inter Populum Carthaginiensem, &c. Lib. XL. Cap. XVII. Num. 1, 6.*

XLIX. (1) Which the *Latins* called *Permittere de se arbitrium*, as appears by the Demand which the *Roman Senate* made to the *Aetolians*, *Interrogati ab uno Senatore, permetterentne arbitrium de se Populo Romano, &c. LIVY, Lib. XXXVII. (Cap. XLIX. Num. 4.) GROTIUS.*

† [[There is a second footnote number "1" here in the original, apparently a misprint.]]

2. *De Punic. Bell. (p. 34. Edit. H. Steph.)*

do; they will then take kindly of us whatever we grant them, since they cannot consider it as the Effect of a Treaty concluded with them. Now this makes a great Difference: For whilst we enter into Treaties with them, they will always have some Pretence to break them, alledging, that they had been wronged in some Part of them. For since many Things are capable of a double Interpretation, there will always remain Room for a ^{<711>} Dispute: Whereas, if they surrender, and we disarm them, and become Masters of their Persons, they will then see that they have nothing properly their own; they will humble themselves, and whatsoever they shall receive from us, they will look upon as of meer Grace and Favour.

2. But here we must also distinguish, what the Vanquished ought to suffer, and what the Conqueror may do, either in Strictness, or without transgressing some Duty, or without exacting what is unworthy of him. The Conquered having yielded himself, must suffer any Thing at the Will of his Conqueror, as being now in Subjection; and if we respect the ³ external Right of War, they have nothing but what may be taken from them, their very Lives and personal Liberty, much more their Goods, whether publick, or belonging to private Persons. *Livy* tells us in another Place, ⁴ that *The Aetolians having surrendered at Discretion, were afraid lest they should be ill-used in their Persons.* We have cited ^a in another Place, *When all Things are surrendered to the Conqueror, it depends on him to take away or to leave what he pleases.* To this agrees that of *Livy*, ⁵ *It was the antient Custom of the Romans, when they would not*

^a Ch. 8. of this Book, § 4.

3. In Reality it is not merely as being become the Conqueror's Subject, that the Conquered may be treated in this Manner. Our Author is far from believing, that the latter, who in extreme Necessity, for Instance, render themselves Subjects to any one, who was not their Enemy, and give him the most absolute Power over them (which in *Latin* is expressed by *dedere se.*) (See above, *B. II. Chap. V. § 31.*) that the latter, I say, consent, that he should dispose at his Pleasure of their Estates and personal Liberty, and still less of their Lives. I observe this, because some Writers have falsely imagined that our Author has confounded these different Manners of submitting to a Person with each other.

4. *Et permissis libero arbitrio, ne in corpora sua saeviretur, metuebant.* Lib. XXXVII. (Cap. VII. Num. 1.)

5. *Mos vetustus erat Romanis, &c.* Idem, (Lib. XXVIII. Cap. XXXIV. Num. 7.) GROTIUS.

Our Author cites this Passage from the seventh Book of the *Roman* Historian,

make any Treaty, either of Peace or Friendship with a People, to punish them by Arms, till they had surrendered themselves with all their Right, divine and human, given Hostages, delivered up their Arms, and received Garrisons into their Towns. And even sometimes those that yielded themselves might be killed, as we have shewn in ^b another Place.

^b B. 3. c. II.
§ 16.

L. *The Duty of the Conqueror, with Respect to those who thus surrender.*

L. I. But the Conqueror, that he may do nothing unjustly, ought first to take Care that no Man be killed, unless for some capital Crime; so also, that no Man's Goods be taken away, unless by Way of just Punishment. ¹ And even by keeping within these Bounds, as far as his own Security will permit it, it is honourable (to a Conqueror) to shew Clemency and Liberality, and sometimes even necessary, by the Rules of Virtue, according as Circumstances shall require.

^a B. 3. c. 15.
§ 16.

2. Admirable are the Conclusions of those Wars which are finished with a general Pardon, as I have ^a said in another Place. Thus pleaded *Nicolaus the Syracusan*, in *Diodorus*, ² *They surrendered themselves up, with their Arms, trusting to the Mercy of the Conquerors; it would then be an eternal Shame, that they should be deceived in their Opinion of our Clemency.* And again, *What Grecian ever condemned them to barbarous Punishment, who yielded to the Mercy of the Conqueror?* And thus *Octavius Caesar*, in *Appian*, speaks to *L. Antonius*, coming to surrender himself, ³ *If you had come purely to treat with me, you should have found me a Conqueror highly incensed at your Actions; but now you come to surrender yourself, your Friends, and your Army to our Discretion, you have disarmed my Anger, and taken from me the Power which you would have been forced to give me, if we had made an Agreement together; for upon*

which was occasioned by his having taken it from the *Semestria* of PETER DU FAUR, *Lib. I. Cap. VII. p. m. 43.* where we find this false Citation, with another from another Book of LIVY.

L. (1) See a remarkable Example of this in MARIANA's History of *Ferdinand*, King of *Leon*, *Lib. XI. Cap. XV.* and compare this Place with what we have said in the eleventh Chapter of this last Book, § 14, 15. GROTIUS.

2. *Lib. XIII. Cap. XXI. and XXIII. p. 342, 343. Edit. H. Steph.*

3. *De Bell. Civil. Lib. V. p. 697. Edit. H. Steph.*

considering what you ought to suffer, and I to grant, I shall prefer my Honour to Revenge.

3. We often meet in *Roman Histories*⁴ with these Expressions, *Tradere se in fidem*, To yield themselves to the Faith. *Tradere in fidem & clementiam*, To yield <712> to the Faith and Clemency. So in the thirty-seventh Book of *Livy*, *He gave a gracious Audience to the neighbouring Embassadors, that came to surrender their States to the Faith of the Romans*. And in the forty-fourth Book, *Paulus earnestly desiring that he might be allowed to surrender himself, and all he had, unto the Faith and Clemency of the People of Rome*. But it must be understood, that by these Words is meant an absolute Surrender:⁵ And that the Word *Fides* in these Places signifies nothing but the Probity of the Conqueror, to which the Conquered yields himself.

4. There⁶ is a remarkable Story in *Polybius* and *Livy*, of *Phaneas*, an *Aetolian* Ambassador, who, in his Speech to the Consul *Manius*, said these submissive Words, that *The Aetolians did freely surrender themselves, and all they had, to the Faith of the People of Rome*. Which when he had affirmed again to the Consul, who asked whether that was really the Design of the *Aetolians*; the Consul demanded that the chief Authors of the War should be immediately delivered up to him. *Phaneas*

4. For Instance in *LIVY: Legationes finitimas ab Elaeunte, & Dardono, & Rheteo, TRADENTES IN FIDEM civitates suas benigne audivit. Lib. XXXVII. (Cap. IX. Num. 7.) Paullo, ut se suaque omnia in FIDEM ET CLEMENTIAM Populi Romani PERMITTERET, contendente. Lib. XLV. Cap. IV. in fin. GROTIUS.*

To which may be added, this Passage of another *Roman* Historian, from whence it appears, that Persons surrendered in this Manner without Conditions: *Mittuntur ad Imperatorem legati, qui Jugurtham imperata facturum, ac SINE ULLA PACTIONE sese regnumque suum IN ILLIUS FIDEM tradere. SALLUST, De Bell. Jug. Cap. LXVI. Edit. Wass.*

5. It is the same Thing, according to *POLYBIUS*, as to surrender to the Conqueror's Discretion. *Excerpt. Legat. XIII. The Greeks express this thus, 'Εἰς δίκην σφᾶς αὐτοῦ παραδιδόναι, as in THUCYDIDES, Lib. III. (Cap. LXVII.) DIODORUS SICULUS says, Καθ' αὐτῶν ἐπιτρέπειν ἐξουσίαν. Lib. XIV. GROTIUS.*

The last Passage is, *Τὴν πᾶσαν καθ' αὐτῶν ἐπιτρέψαντες ἐξουσίαν. Biblioth. Histor. Lib. XIV. Cap. CXII. p. 453. Edit. H. Steph.*

6. *Ubi supra, (p. III6. Edit. Amstel.) LIVY expresses it thus, Ita ad extremum finivit, ut diceret, Aetolos se suaque omnia fidei Populi Romani permittere. Lib. XXXVI. (Cap. XXVIII. Num. 1.) GROTIUS.*

presently replied, ⁷ We surrender ourselves up to your Faith, not unto Slavery: And added, that it was not the Custom of the *Greeks* to exact such a Thing as he commanded the *Aetolians* to do. The Consul answered, he valued not what the Custom of the *Grecians* was; that, according to the Custom of the *Romans*, he had an absolute Power over those who had surrendered themselves by publick Deliberation; and presently ordered the Embassadors to be laid in Irons, ⁸ *Do ye, having surrendered yourselves to our Faith, pretend to teach us what in Duty and Honour we should do?* as *Polybius* has it. From which Words it is plain, what he to whose Faith any People have surrendered themselves, may do with Impunity, and without violating the Law of Nations. However, the *Roman* Consul did not make Use of this Power, but dismissed the Embassadors, and permitted the *Aetolians* to have a new Consultation in their Assembly. ⁹ Thus the People of *Rome* are said to have answered the *Falisci*: That they had been informed the *Falisci* had yielded themselves, not to the Power, but the Faith, of the *Romans*. And of the *Campanians*, we read, ¹⁰ that they had submitted absolutely, and not by any Agreement.

5. But concerning his Duty to whom the Surrender is made, that of *Seneca* ¹¹ is very applicable, *Clemency has an unlimited Power to judge: It is not tied down by the Forms of Law, but pronounces according to Equity: It may both absolve and condemn, as it thinks fit.* Neither does it signify much how the Person surrendering expresses himself, whether he yield to the Wisdom, Moderation, or Mercy of the Conqueror, for they are

7. *Non in servitutem inquit, &c.* LIVY, *ubi supra*, Num. 4, 5, 6.

8. *Ubi supra.*

9. *Adversus quam [civitatem] saevire cupiens, &c.* VALERIUS MAXIMUS, *Lib. VI. Cap. V. Num. 1.*

10. *CAMPANORUM aliam conditionem esse, qui non foedere, sed per deditionem, in fidem venissent.* LIVY, *Lib. VIII. (Cap. II. Num. 13.)*

This Example relates to a different Manner of speaking, of which our Author has himself treated above, *B. I. Chap. III. § 21. Num. 3.*

11. *Clementia liberum arbitrium habet; non sub formula, sed ex aequo & bono, judicat. & absolvere illi licet, & quanti vult, taxare litem.* De *Clement. Lib. II. Cap. VII.* This alludes again to the Difference there was, according to the *Roman* Law, between *Judex* and *Arbiter*, of which I have spoke in *Note 1.* upon § 47.

all but Compliments, the Reality of the Matter is, the Conqueror becomes absolute Master to do what he pleases.

LI. But yet there are also conditional Surrenders, which are made either in Favour of private Persons, as when ¹ the saving their Lives, their personal Liberty, or <713> some of their Goods ² be expressly stipulated; or in Favour of the whole Body of People, whence may result a mixt Government, of which we ^a have treated in another Place.

LI. *Of a conditional Surrender.*

^a B. I. c. 3. § 17.

LII. To publick Treaties are sometimes joined Hostages and Pledges, which are a Sort of Accessory. Hostages (we have ^a said) are either such as freely give themselves, or are given by him that hath the sovereign Power. [[¹]] For he that is possessed of the supreme civil Power, has a

LII. *Who may and ought to be given for Hostages.*

^a B. 3. c. 4. § 14. and c. II. § 18.

LI. (1) Thus the Inhabitants of the City of *Phocaea*, when they surrendered their City to *L. Aemilius Regillus*, stipulated, that no Hurt should be done to them. *Tum portas aperuerunt, pacti, ne quid hostile poterentur.* LIVY, *Lib. XXXVII. Cap. XXXII. Num. 10.*

2. The *Roman Praetor*, spoken of in the foregoing Note, restored to the *Phocaeans* their City, Lands, and Liberty to live according to their own Laws. *Urbem, agrosque, & suas leges iis restituit.* LIVY, *ibid. Num. 14.* It is true, the Historian does not say this was by Way of Composition; but nothing hinders its being stipulated upon surrendering. Mr. THOMASius, in his Dissertation *De Sponsione Romanorum Numantina*, § 12. maintains, that there is no Example of a Composition, by which the Conqueror left those who surrendered any Part of their Civil Liberty. He adds some other Remarks against our Author, which I shall not examine; tho' he does not seem to have sufficiently comprehended his Principles. See above § 49. Note 3.

LII. [[Footnote number missing in text in original.]] (1) There are also Hostages, neither given by the Sovereign nor themselves, but taken by the Enemy. In this Manner *Joash* made the Children of *Amasiah* Hostages, *2 Kings* xiv. 14. *Alexander the Great* took thirty thousand, as QUINTUS CURTIUS relates, *Lib. VIII. Cap. V. Num. 1.* and *Hannibal*, four thousand, as we find in LIVY, *Lib. XXI. Cap. XXI.* at the End. There are many other Instances of it in antient History: And nothing is more common in these Days than to take Hostages by Force, for the Security of Contributions. There is a great Difference, with Regard to the Effects of Right, between Hostages of this Kind, and those which are given by the State. For the former, unless they have engaged by Promise to remain in the Hands of the Enemy, may not only escape, (as our Author admits the other to do also, tho' without sufficient Reason, as we shall see below) but the State may receive them, as well as any other Prisoners that make their Escape. This is what the late Mr. BATTIER, Professor of Law, and Syndick at *Basil*, has very

Right both over the ² Actions and the Goods of the Subjects; but the Prince, or State, shall be obliged to make Satisfaction to him or his Friends, for any Losses which he may thereby suffer. And if it be indifferent to the State, which, of several Persons, goes as Hostage, it is best to decide that by Lots; but the Lord of a Fief has not this Right over his Vassal, unless he be also his ³ Subject; for the Homage and Obedience that he owes him, does not reach so far.

LIII. *What Right is given over Hostages.*

LIII. We have already said, that a Hostage may be put to Death by the external Right of Nations, but not by the internal, unless he himself be guilty of a capital Crime. Neither can they become ¹ Slaves; but they may even by the Right of Nations enjoy, and leave their Goods to their Heirs. Tho' it is provided by the *Roman Law*, that their Goods ² should be confiscated to the Publick.

well observed, in a small Dissertation *De Obsidibus, & eorum jure*, § 12. See below, § 53. *Note I.*

2. And, in Consequence, the State may engage the corporal Liberty of Subjects, which is all that the Engagement of Hostages includes of itself. See PUFENDORF, *Law of Nature and Nations*, B. VIII. Chap. II. § 6.

3. Or unless it has been expressly stipulated in the Act of Investiture. See CUJAS, *in Feud.* Lib. II. Cap. VII. and ALBERICUS GENTILIS, *De Jure Belli*, Lib. II. Cap. XIX. p. 397.

LIII. (1) Hostages are demanded and given for the Security of the Execution of some Engagement: Now in this Case it suffices, that the Hostages are retained, in such Manner as shall be judged proper, till the Performance of the Things agreed on; it is not at all necessary, that the Hostages become Slaves. But it is not the same in Regard to those which are taken after a City has been reduced to surrender; for they ought to be considered as Prisoners, who, according to the received Custom of old, became Slaves. The Hostages also, who have been given voluntarily, if those who gave them break the Conventions, and renew the War, fall into the same Condition; because, from thenceforth they become Enemies again. This Mr. BATTIER observes also, in the Dissertation cited before, (§ 19.)

2. DIVUS COMMODUS rescripsit, *Obsidum bona, sunt Captivorum, omnimodo in fiscum esse cogenda.* Digest, Lib. XLIX. Tit. XIV. *De Jure Fisci*, Leg. XXXI. But the Hostages might make Wills, if the *Roman* People or Emperor permitted them; or if they had acquired the *jus togae*, that is to say, the Freedom of the City of *Rome*. See the following Law of the Title here cited, and CUJAS upon *Law XI.* of the Title *Qui testamenta facere possunt*, p. 1068. col. 2. Vol. I. Opp. *Edit. Fabrott.* as also the Treatise of the late Baron SPANHEIM intitled *Orbis Romanus* II. 7. p. 239, 240.

LIV. The Query is, whether a Hostage may lawfully Escape? And certainly he may not; if at first, or since, he hath engaged his Word (in Order to have a little more Liberty) that he would not; otherwise, it does not seem to be the Intent of the State that sent him, ¹ to oblige their Subject from making his Escape, but to <714> allow the Enemy to secure him as he pleased: And thus may the Fact of *Clelia* be defended. But tho' she had not offended in doing it, yet the State could not ² receive and detain their Hostage; whereupon *Porsenna* declared, ³ *If they did not send back his Hostage, he would take it as a Breach of the Treaty.* Then ⁴ *The Romans immediately restored her, according to Covenant, as a Pledge of the Peace.*

LIV. *Whether Hostages may lawfully escape.*

LV. The Obligation of Hostages has something odious in it, both because it is contrary to Liberty, and because it arises from the Fact of another: So that we are here to explain the Sense of the Terms in a Manner that restrains, as much as possible, such an Engagement. And therefore, they who are delivered Hostages on one Account, cannot be detained on another: Which must be taken thus, provided any other

LV. *Whether a Hostage may be lawfully detained upon any other Account.*

LIV. (1) But says Mr. BUDDAEUS, (in his Dissertation intitled, *Jurisprud. Hist. Specimen*, § 56.) either the State did intend that the Hostage should continue in the Hands of him to whom he was given, or that the State had not Power to oblige the Hostage to remain. The first is manifestly false; for otherwise the Hostage could be no Security, and the Convention would be illusive. Nor is the other more true; for if the State, by Vertue of its *eminent Domain*, can expose even the Lives of the Citizens, why may it not engage their Liberty? Mr. BATTIER, in the Dissertation which I have cited more than once, (§ 18.) declares also, and with Reason, against our Author's Opinion; who does not agree himself with what he advances, that the State ought to give up fugitive Hostages, as Mr. VANDER MEULEN observes on this Place.

2. See what PLUTARCH says upon it, in the Life of *Publicola*. VIRGIL speaking of the Action of *Clelia*, says, that, having broken her Chains, she saved herself by Swimming,

Et fluvium vinclis innaret Cloelia ruptis.

(*Aeneid*, VIII. 651.) which the Commentator SERVIUS explains of the Engagement of the Treaty. *Sed vincla pro custodiis accipimus, aut certe pro foederibus, &c.* GROTIUS.

3. *Quemadmodum, si non dedatur obses, pro rupto se foedus habiturum, &c.* LIVY, *Lib. II. Cap. XIII. Num. 8.*

4. *Et Romani pignus pacis ex foedere restituerunt, &c.* Ibid. *Num. 9.*

Promise in Question was made, without an Engagement at the same Time to give Hostages; but if we have already broke our Faith in any other Case, or a just Debt be contracted, then the Hostage may be retained, yet not as a Hostage, but by the Law of Nations, ^a whereby Subjects may be retained Prisoners for their Sovereign's Debts, *κατ' ἀνδροληψίαν*, by way of Arrest, or Reprisal. Which however may easily be prevented, by inserting an express Clause, that the Hostages shall be ¹ restored, when that shall be performed for which they were given.

^a See B. 3. c. 2.

LVI. Upon
the Death
of the Princi-
pal, the Hos-
tage to be free.

LVI. He that is delivered as a Hostage only, to release either a Prisoner or another Hostage, if this die the other is released; for by his Death all Right of Pledge dies with him, as *Ulpian* has said, in the Case of a ransomed Prisoner: Wherefore as in *Ulpian's* ¹ Case, the Ransom ceases to be due by the Death of the Person, in whose Room it had been substituted, so in this Case, the Person substituted cannot be here detained. Therefore the Demand of *Demetrius* to the Roman Senate to be dismissed, was not unreasonable, *As being a Hostage for Antiochus, he being dead, he ceased to be so*, says ² *Appian*; and *Justin* out of *Trogus*, ³ *Demetrius being a Hostage at Rome, as soon as ever he heard of the Death of his Brother Antiochus, went directly to the Senate, and told them he came*

L.V. (i) That is to say, even tho' there be some other Reason for which they might be retained without that Clause. This is evidently our Author's Thought. So that *ZIEGLER*, and others after him, are in the Wrong to suppose the contrary; since they object to him, that an express Convention would not have more Force than a tacit one, by which the Party that receives Hostages, always engages to restore them, as soon as that is performed, for the Security of which they were given.

LVI. (i) See the Law cited above, *Chap. IX* of this Book, § 10. Note 7.

2. *De Bell. Syr.* p. 117. *Edit. H. Steph.*

3. *Patruus ejus Demetrius, qui obses Rome erat, cognita morte Antiochi fratris, Senatum adiit, Obsidemque se, vivo fratre, venisse; quo mortuo, cujus obses sit, se ignorare. Lib. XXXIV. Cap. III. Num. 6.* Our Author observed here, that it was better to read, for the Connection of the Discourse, *Obsidem inquiring se, &c.* But *BERNEGGER* rejects this Correction, in his Note on this Place, without saying who is the Inventor of it. *SCHEFFER* however approves it. It is better, in my Opinion, to read *Obsidem se*, leaving out the *que*, which is not in some Manuscripts, as the latter of those Commentators acknowledges, that the Passage may be read without Inconvenience, by an Ellipsis, frequent in the antient Abridger we speak of.

thither as a Hostage for his Brother, being alive, but now he was dead he could not tell whose Hostage he was.

LVII. But if the King who made the Covenant die, shall his Hostage still be detained? That depends upon what we have ^a already said, whether the Treaty were personal or real. For Accessories cannot justify us in receding from the general Rule in the Interpretation of Principal Acts, whose Nature they themselves also ought to follow.

LVII. *The King dying, whether the Hostage may be retained.*

^a B. 2. c. 16. § 16.

LVIII. By the Way we must add this, that Hostages sometimes are not a bare Accessory of the Obligation, but really the ¹ principal Party; as when by Agree-ment, a Person having engaged himself for the Fact of another, and being bound for Damages and Interest, in Case what he promises is not executed, gives Hostages in his stead: And this seems to have been the Meaning of the Treaty concluded near the *Furcae Caudinae*, as we have ^a remarked elsewhere. But the Opinion of those who maintain, that ² Hostages may stand engaged for the Fact of one another, even without a mutual Consent, is not only severe but unjust.

LVIII. *Hostages may be principally obliged, and one of them is not bound for the Fact of another.*

^a B. 2. c. 15. § 16.

LIX. Pledges have some Things common with Hostages, and some peculiar to themselves. What they have in common is, they may be detained for another ¹ Debt at present due, unless Faith be given to the

LIX. *What Obligation lies upon Pledges.*

LVIII. (1) That is to say, they ought themselves to execute, in default of him for whom they are given as Hostages, what he had engaged to do, so that the Obligation of the former does not cease by the Death of the latter: And, at Bottom it is the same Thing as if they had entered into the Engagement themselves, and in their own Name. For, as to the Rest, our Author does by no Means pretend, that their Obligation may not be in itself subsidiary; as ZIEGLER supposes, and others after him, who, without Reason, often criticise this great Man, for Want of understanding his Thoughts.

2. ALBERICUS GENTILIS, whom our Author cites in the Margin, does not say this. He supposes, on the contrary, (*p.* 396. *Edit. Hanov.* 1612.) that there has been a Consent of the Hostages themselves. ZIEGLER has before observed this Mistake.

LIX. (1) With this Difference however, that in such Case the Pledge is retained as a Pledge; but the Hostage not as an Hostage, but as a Subject responsible in that Quality for the Act of his Sovereign; as our Author has explained it above, § 55. *Num.* 2.

contrary. The Peculiar is, that what Contract soever is made concerning these, is not so strictly taken as that concerning Hostages. For this Act is not in itself so odious, because it is natural that Things ² should be kept, not Men.

LX. *The Right of Redemption, how lost.*

^a B. 2. c. 4. § 15.

LX. We have said ^a elsewhere, that no Time can prejudice the Right of Redemption, if that be performed for which the Things were first deposited. For that Act which has an antient and manifest Cause, cannot easily be believed to proceed from a new one; therefore tho' the Debtor has left the Pledge for a very long Time in the Hands of the Creditor, it is presumed he has done it, by supposing that the antient Contract still subsisted, and not because he renounced his Right; Unless some evident Conjectures necessarily require another Interpretation. ¹ As if when a Man was ready to have redeemed it, but met with some Impediment, and afterwards kept Silence so long as to give Reason to suppose that he had voluntarily abandoned it.

2. One is more easily induced to leave Things than Persons in the Hands of another. This suffices as a Foundation for the Restriction.

LX. (i) See what I have said, *B. II. Chap. IV.* upon § 15. or last.

*Of Faith during War, of Truces,
of Safe-Conduct, and the Redemption
of Prisoners.*

I. 1. There are some Things that use to be granted mutually by sovereign Princes, in Time of War, which ¹ *Virgil* and ² *Tacitus* call *Belli Commercium*, *The Commerce of Wars*. ³ *Homer*, Συνημόσυναι. Such as Truce, Safe-Conducts, Ransom of Prisoners. A Truce is an Agreement, by which, during the War, for a Time we forbear all Acts of Hostility. I say, during the War: For as *Cicero* ⁴ says, in his eighth *Philippick*, there is no Middle between War and Peace. And War is a certain State, which (like Habits) may subsist, even tho' its Actions be for a While suspended. *Aristotle* says, ⁵ *A Man may be virtuous, tho' asleep, and tho' he lead an inactive Life*. And again, *The* ⁶ *Distance of Place doth not dis-*

I. *What a Truce is, and whether it be a Time of Peace or War.*

I. (1) ——— *BELLI COMMERCIA Turnus*
Sustulet ista prior ———
(*Aeneid* X. 532.)

2. *Neque enim capere, aut venundare, aliudve quod BELLUM COMMERCIIUM, sed caedes, patibula, &c.* *Annal. Lib. XIV. Cap. XXXIII. Num. 5.* See also *Histor. Lib. III. Cap. LXXXI. Num. 4.*

3. *Iliad. Lib. XXII. ver. 261.*

4. *Etenim cum inter Bellum & Pacem medium nihil sit, &c.* *Philip. VIII. Cap. I.*

5. (*Ethic. Nicomach. Lib. I. Cap. III.*)

6. *Ibid. Lib. VIII. Cap. VI.*

⁷ *Andronicus Rhodius*, *There may be a Habit, tho' at present it may not operate.* So ⁸ *Eustratius*, *An Habit, in Respect to an Ability simply taken, is called an Act, but in Respect to Action itself, is called Power; as Geometry is in a Geometrician when he is asleep.* And in *Horace*, Lib. I. Sat. 3.

*Ut, quamvis tacet Hermogenes, cantor tamen, atque
Optimus est modulator, & Alfenus vafer, omni
Abjecto instrumento Artis, clausâque tabernâ
Sutor erat ———*

*Why, as Hermogenes, * tho' he holds his Tongue,
Is skill'd in Musick, and can set a Song;
And shuffling Alfen, tho' he lost his Awl,
And threw away his Last, and shut his Stall,
And broke his Threads, yet was a Cobler still.* Creech.

2. So then, as *Gellius* says, ⁹ *A Truce cannot be called a Peace, for the War continues, tho' Fighting ceases.* And in the Panegyrick of *Latinus Pacatus*, ¹⁰ *Truce suspends the Effects of War.* Which I here mention, that we may understand ¹¹ that whatever is agreed upon to be of Force during a War, has also the same Force during a Truce; unless it fully appear, that it was not so much the general State of War, as the Exercise ¹² of it, was had Regard to. On the contrary, if any Thing be agreed on concerning Peace, it is of no Force in Time of Truce. Tho' *Virgil* calls a

⁷ *Paraph.* Lib. I. Cap. XIV. p. 47. *Edit. Heins.*

⁸ *Ad VI. Ethic. Nicom.* (Cap. I.)

* *SENECA* maintains, that an eloquent Man is such, tho' he holds his Tongue, and an Artist an Artist, tho' he has not the Instruments necessary for the Exercise of his Trade: *Artifex est etiam, cui ad exercendam artem instrumenta non suppetant—Quomodo est disertus, etiam qui tacet.* *De Benefic. Lib. IV. Cap. XXI.*

⁹ *Nam neque pax est Induciae: Bellum enim manet, pugna cessat, &c.* *Noct. Attic. Lib. I. Cap. XXV.*

¹⁰ *Quum induciae bella suspenderant, &c.* *Cap. IX. Num. 5. Edit. Cellar.*

¹¹ For Instance, to pay so much for the Ransom of Prisoners, during the War, &c. that Commerce should be free during the War, between Merchants, &c.

¹² If, for Instance, certain Contributions during the War be agreed on, as those Contributions are only granted to prevent Acts of Hostility; they ought to cease during the Truce, because at that Time Acts of Hostility are no longer lawful.

Truce ¹³ *Pacem Sequestram, A provisional Peace*; and *Servius*, ¹⁴ *A temporary Peace*; and so does the Scholiast on *Thucydides*, ¹⁵ *A temporary Peace bringing forth War*. *Varro*, ¹⁶ *Pacem Castrorum, The Peace of Camps for a few Days*. All which are not Definitions, but certain Descriptions, and those figurative: Such also was that of *Varro*, ¹⁷ when he calls it *Bellorum ferias, War's Holy-Day*: He might as well have called it *Belli Somnum, War's Sleep*. So *Stattius* ¹⁸ called the Days wherein there was no Pleading, *Peace*. And *Aristotle* ¹⁹ called Sleep *The Chain of the Senses*; and so you may call Truce, *The Fetters of War*.

3. But in *M. Varro's* Exposition (which also ²⁰ *Donatus* follows) ²¹ *Gellius* finds just Fault with this, that he added, *A few Days*, shewing that it is sometimes granted for a few Hours, I may also add, for twenty, thirty, forty, nay a hundred Years, of which we have Examples in *Livy*; ²² which may also confute that De-^{<717>}inition of *Paulus* the Lawyer,

13. ——— *Et pace sequestrà*
Per Silvas Teucris, mixtique impune Latini
Erravêre jugis ———
Aeneid, Lib. XI. ver. 133. & seq.

14. PACEM ergo SEQUESTRAM inducias dicit: id est, pacem temporalem, & mediam inter bellum praeteritum & futurum.

15. In *Lib. I. Cap. XL. p. 25. Note 3. Edit. Oxon.* It is a maritime Term applied here. See the Dissertation of a learned *German* Civilian named JOHN STRAUCHIUS, *De Induciis*, (§ 2.) which is the fifth and last of a Collection printed at *Brunswick*, in 1662.

16. INDUCIAE, inquit, sunt pax castrens, paucorum dierum. Apud GELLIUS, ubi supra, I. 25.

17. Item alio in loco: INDUCIAE, inquit, sunt belli feriae. *Idem, ibid.*

18. Et PACEM piger annus habet, mensesque reversa
 Dimisere forum ———
Silvar. Lib. IV. Silv. IV. ver. 40.

19. *Lib. De Somn. & Vigil. Cap. I. in fin.*

20. INDUCIAE sunt pax in paucos dies, vel quod in diem dentur, vel quod in dies otium praebeant. In *Eunuch. TARENT. Act. I. Scen. I. ver. 15.*

21. Neque paucorum tantum, &c. *Noct. Attic. I. 25.*

22. See *Lib. I. Cap. XV. and Lib. VII. Cap. XX.* and compare PUFENDORF with this Place, *Law of Nature and Nations*, B. VIII. Chap. VII. § 3, 4.

²³ *A Truce is, when it is agreed for a short Time, and for the present Time, that neither Party shall offer Acts of Hostility.*

4. But yet it is possible, if it shall clearly appear, that Cessation from Acts of Hostility in general, was the only Reason simply and wholly moving both Parties to make such an Agreement, that then ²⁴ whatsoever is said concerning a Time of Peace, may be likewise said of a Truce; not by Vertue of the Word, but from a certain Conjecture of the Intention of the Mind; of which we have treated ^a elsewhere.

^a B. 2. c. 16.
§ 20.

II. *The Original of the Word Induciae.*

II. The Word ¹ *Induciae* (a Truce) is not (as *Gellius* would have it) from *inde uti jam*, because the *Moment* it is ended we may act *as before*: Nor (according to *Opilius*) from *Endoitus*, which signifies *Entry*; because we may then enter freely into Lands of one another; but from *inde otium*, because there should be *Rest* from *such a Time*, as the *Greeks* call it *ἐκεχειρία*. For it appears, both from *Gellius* and *Opilius*, that the Word (*Induciae*) was by the Antients written with a *t* and not a *c*; and what we now use in the Plural, was certainly used of old in the Singular Number. The antient Manner of Writing was *Endoitia*; for then they pro-

23. *Induciae sunt, quum in breve & in praesens tempus convenit, ne invicem se laessant: Quo tempore non est postliminium.* Digest, Lib. XLIX. Tit. XV. De Captiv. & Postlim. &c. Leg. XIX. § 1.

24. For Instance, if it be agreed, that, during the Peace, the Subjects on both Sides may traffick in certain Merchandises of no Use in War.

II. (1) Mr. BARBEYRAC has thrown all but the last Period of this Paragraph into a Note, and says, it may serve, as much as any other, to justify the same Liberty, which he has taken in many Places, in Regard to Things little necessary, that often interrupt the Chain of the Discourse, so as to occasion the losing Sight of the principal Subject. What a Mess are all these grammatical Niceties, continues he, to a Reader who enquires here after the Law of Nature and Nations? How well founded and useful soever they may be in other Respects, an Author ought to resist the Temptation he may be under, of placing so preposterously the Discoveries he believes he has made of this Kind; and nothing proves better the Necessity of permitting Writers to use Notes upon their own Works; because they may thereby satisfy themselves, and even sometimes serve the Publick, without Offence to their Readers, or prejudicial to the Understanding of the Subject they treat of. For the Rest, as Tastes are very different, especially in Point of Etymologies, some are for deriving *Induciae*, not from *inde*, but from the old Word *endu* or *indu*, for *in*. See the *Institutiones Oratoriae* of Vossius, Lib. IV. Cap. XIII. § II. and his *Etymologicon*.

nounced *Otium*, Rest, *Oitium*, from the Verb *Oiti*, which we now pronounce *Uti*, to use; as from *Poina* ^a (we now write *Poena*, Punishment) is made *Punio*, to punish; and from *Poinus* (now *Poenus*, a *Carthaginian*) is made *Punicus*. So of the Word *Ostia*, *Ostiorum*, the Entries or Mouths of Rivers, is now made *Ostia*, *Ostiae*; ^b so from *Indoitia*, *Indoitiorum*, is made *Indoitia*, *Indoitiae*, and thence *Indutia*, whose Plural (as I said) is now only in use. *Gellius* says it was also used formerly in the singular Number. *Donatus* is not much in the wrong, when he would derive *Inducia*, from *in dies otium*, *A Rest for some Days*. A Truce then is a Rest in War, not a Peace; therefore some Historians nicely distinguish it, when they say a Peace ² was refused, but a Truce granted.

^a See *Servius in Aen.* x. 24.

^b And from *Ostrea*, *Ostreorum*, *Ostraea*, *Ostreae*, an *Oyster*.

III. Wherefore, the Truce being expired, there is no Occasion for a new Declaration of a War; for the temporary Impediment ¹ being removed, the State of War, which was only suspended, and not extinct, returns of itself; as the Use of the Right of Property, and the Exercise of paternal Power, in Regard to a Madman, when he is come to himself. But we read in *Livy*, that by the Judgment of the Heralds, War was formerly denounced upon the expiring of a Truce. But the old *Romans* were desirous to shew, by those unnecessary Cautions, how much they loved Peace, and how careful they were not to engage in War, unless for just Reasons. *Livy* intimates as much, when he says, ² *After a Battle fought with the Veientes, at Nomentum and Fidenae, a Truce was granted, but no Peace made, and the Truce expired, and they had rebelled within that Time, yet the Heralds were sent to demand Satisfaction, according to antient Custom: But they would not hear them.*

III. *Upon the ending of a Truce there is no Need of denouncing War again.*

IV. 1. The time appointed for a Truce, is either continual, as when it is made for a hundred Days, or by prefixing a Time when it shall end, as unto the Calends <718> (or first Day) of *March*. In the former Case the

IV. *How the Time of a Truce is to be computed.*

2. Thus, for Instance, *LIVY* says of *Papirius*, in Regard of the *Falisci*. *Et Faliscis PACEM petentibus annuas Inducias dedit.* Lib. X. Cap. XLVI. Num. 12. See the Passage cited in *Note 2.* on the following Paragraph.

III. (1) See *PUFENDORF, Law of Nature and Nations*, Lib. VIII. Cap. VIII. § 6.

2. *Cum Veientibus nuper acie, &c.* Lib. IV. Cap. XXX. Num. 14.

Time must be ¹ reckoned according to its just Measure, that is, conformably to its natural Measure: For that Account which is made by Days civil, arises from the Laws and Customs of Nations. In the other Case it is generally asked, whether the Day, the Month, or the Year, on which the Truce is to expire, is meant to be excluded or included.

2. It is certain, that as in natural Things there are two Sorts of Bounds, the one within the Thing, as the Skin is the Bound of the Body; the other without the Thing, as a River is the Bound of the Land: So, according to either of these two Ways, may those Bounds that depend on the Will be conceived; but it seems more natural, ² that the Bound should be taken, which is part of the Thing, *That is called the Bound of any Thing which is the extrem Part of it*, says Aristotle. ³ Neither is this against ⁴ common Use. *Spurina* forewarned *Caesar* of a Danger that should not exceed the ⁵ Ides (or the 15th) of *March*. Being asked upon the very Day about it, he said, it was indeed *come*, but not yet *past*. Wherefore much more should this Interpretation of Truces be thus understood, where the

IV. (1) That is to say, from the Moment the Truce is concluded, to the same Moment of the last Day; and not with Regard to the Beginning or End of the Civil Day, which begins and ends at different Times, according to the Places and Customs of different Nations. Thus, by the *Roman Law*, an Infant is held to be a Year old, when it attains to the Beginning of the three hundred and sixty-fifth Day: Whereas, according to the natural Calculation, the Year is not compleat till that Moment of the Day in which the Child came into the World. *Anniculus, non statim ut natus est, sed trecentesimo sexagesimo quinto die dicitur, incipiente planè, non exacto die: Quia annum civiliter, non ad momenta temporum, sed ad dies, numeramus.* Digest, *Lib. L. Tit. XVI. De verborum signific.* Leg. CXXXIV.

2. Thus decides *BALDUS, De Statutis*, in verb. *Usque.* *BARTOLUS* in *L. Patronus*, D. De Legat. III. & in *L. Nuptae* 12. D. *De Senatorib.* *ARCHIDIACONUS*, in *C. Ecclesias.* XIII. Qu. I. *HIERON. DE MONTE, Lib. De Finibus, Cap. XXIII.* *GROTIUS.*

3. *Metaphys.* *Lib. V. Cap. XVII.*

4. *Si quis sic dixerit, ut intra diem mortis ejus aliquid fiat; ipse quoque dies, quo quis mortuus est, numeratur.* Digest, *Lib. L. Tit. XVI. De verb. signific.* Leg. CXXXIII.

5. *Introiit Curiam, spreta religione, Spurrinamque irridens, & ut falsum arguens, quod sine ullâ noxâ Idus Martiae adessent. Quamquam is, venisse quidem eas, diceret, sed non praeteriisse.* *SUETONIUS, in Caes.* (Cap. LXXXI. in fin.) *DION CASSIUS* expresses the Soothsayer's Words thus, *Πάρεστω, οὐδέ πω δὲ παρελήλυθεν.* (*Lib. XLIV.*) And *APPIANUS ALEXANDRINUS, Πάρεισιν αἱ Ἐἰδοί, Ἄλλ' οὐ παρελήλυθασιν.* (*De Bell. Civ. Lib. II. p. 522. Edit. H. Steph.*) *GROTIUS.*

lengthning of the Time has in it something favourable, *viz.* the sparing of human Blood.

3. But yet that Day, from whence a certain Space of Time is to commence, is not to be reckoned in that Space, because ⁶ the Preposition *from* does not signify Conjunction but Separation.

V. This I shall add by the Way, that Truces, and such like Agreements, do immediately oblige both Parties consenting, from the Time they are concluded; but the Subjects on both Sides then begin to be bound, when the Truce receives the Form of Law, that is, when it has been solemnly notified, ¹ which being done, it immediately begins to have a Power to bind the Subjects. But that Power, if the Publication be made only in one Place, shall not at that Instant extend itself throughout the whole Dominion; but upon a convenient Time allowed, to give Notice in every Place. And if any Thing in the mean Time be done by the Subjects contrary to the Truce, they shall not be punishable for it. ² The con-

V. When it begins to bind.

6. But see PUFENDORF, in the Chapter already cited more than once, § 8. What our Author says here is so much the worse founded, as it does not agree with what he had said just before himself; that in Regard to a Truce, the Prolongation of Time has something favourable in it. STRAUCHIUS, in the Dissertation I have cited before, *Cap. V. § 2.* had long ago declared himself against our Author, upon this Head.

V. (1) They cannot know it certainly before that: And the Case is the same as when the War began. It frequently happens that there is Reason to believe, from the Preparations making, and the Rumours or Advices to be relied on, that a War is resolved: However, till the Declaration of it be published in Form, no one ought to attack the Enemy, as may be done afterwards. So that nothing is more frivolous, than the Objections which some Commentators make in this Place against our Author's Opinion.

2. It is true they are not in fault, as it is supposed, that the Truce could not be notified sooner to such as are at a remote Distance. But as each Party stands engaged for himself and Subjects, who, from the Moment the Truce is concluded, should all be held to discontinue Acts of Hostility, if it were possible for them to be apprized of the Treaty, which ought immediately to be notified to them; each ought also to be deemed as engaged to disapprove, and hold for null, all Acts of Hostility committed in remote Places, and, in Consequence, to make all possible Amends to such as have suffered by them. It suffices, that they are not responsible for the Impossibility they have been under to prevent them, and that it cannot reasonably be considered as an Infringement of the Truce.

tracting <719> Parties, however, are not the less bound to repair ³ those Damages.

VI. *What may
be lawfully
done during a
Truce.*

VI. 1. What may be lawfully done, and what not, in the Time of Truce, may be understood from the Definition of it. All ¹ Acts of Hostility are unlawful, either against Persons or Things; that is, whatsoever is then done by Force of Arms against the Enemy. For all such Acts, during the Time of the Truce, is against the Law of Nations, as *L. Aemilius*, in *Livy*, ² tells his Soldiers.

2. Nay, whatsoever Things of the Enemy shall by Accident fall into our Hands, tho' they had been formerly ours, are to be restored; because, in Regard to external Right, by which we are here to regulate ourselves, the Property of them has passed to the Enemy. And therefore, as *Paulus* ³ the Lawyer observes, the Right of Postliminy, during a Truce, does not subsist; because Postliminy supposes an antecedent Right of taking by Force; which ceases during a Truce.

3. To come and go, to have free egress and regress, but without any Train or Attendance that may give Umbrage, is also permitted, as ⁴ *Servius* observes on those Words of *Virgil*,

3. This the *Athenians* pretended, in Relation to *Scione*, which had surrendered two Days after the Conclusion of a Truce. See THUCYDIDES, *Lib. IV. (Cap. CXXII.)* So what the *Spaniards* did in *Italy*, according to MARIANA, XXVIII. 7. is not to be justified. GROTIUS.

VI. (1) The Truce is here supposed to be general. But sometimes a Truce is made for certain Places only, for Instance, by Sea, and not by Land: Or in Regard to certain Acts of Hostility, as the ravaging of the Country, &c. See PUFENDORF, in the Chapter cited above, § 3. Our Author observed, in a small Note upon § 10. that Examples of Truces may be found in PROCOPIUS and MENANDER *the Protector*, in which certain Places were excepted.

2. *Nunc Fraudem hostium incusans, qui, pace petita, induciis datis, per ipsum induciarum tempus, contra jus gentium, ad castra oppugnanda venissent.* Lib. XL. Cap. XXVII. Num. 9.

3. See the Law cited above, § 1. Note 23.

4. *Denique obsessa urbe, &c.* In *Aeneid*, XI. 134. But here the Safety of Egress and Regress is rather meant, than the Care not to do any Thing in going out and coming in, that may give Umbrage to the other Party. For the Rest, the Reader may see the *Paroemiae Juris Germanici* of the late Mr. HERTIUS, II. 14, 15. wherein he explains in what Manner safe Conduct is abused.

Mixtique impune Latini.

Latians, *no longer Foes, mixed in the Woods.*

Where he also tells us, that the City of *Rome* being besieged by *Tarquin*, and a Truce agreed upon between *Porsenna* and the *Romans*, whilst the *Circean* Games were celebrated in the City, the Enemy's Captains were allowed to come into the City, and contend in the Races, and that proving Victors they were crowned.

VII. To retreat back with an Army, which we find in *Livy* that *Philip* did, is not a Breach of Truce; nor to repair a Wall, nor to levy Soldiers,^a unless it be particularly excepted in the Agreement.

VII. *Whether to retire back, to repair Breaches, or the like.*

VIII. 1. It is undoubtedly a Violation of the Truce, to seize on any Place possessed by the Enemy, by corrupting the Garrison. For such an Acquisition cannot be lawful, unless authorised by the Right of War. The same may be said of the Reception of Subjects who would revolt to the Enemy. We have an Example in *Livy's* forty-second Book,¹ when *The People of Coronaea and Haliartus, from a natural Inclination to Monarchy, sent Embassadors into Macedon, to desire a Garrison that might defend them against the insupportable Pride of the Thebans; the King told them he could not send them any, having lately made a Truce with the Romans.* In the fourth Book of *Thucydides*, we read that *Brusidas* received the City *Menda*, revolting from the *Athenians* to the *Lacedemonians* in Time of Truce; but at the same Time an Excuse is added, which is, that he had in his Turn somewhat to charge the *Athenians* with.

^a See an Example in *Paruta*, l. 3.

VIII. *A Distinction concerning seizing of Places.*

2. It is indeed lawful to take Possession of Places deserted, that is, really deserted, *viz.* with a Design not to possess them again; but not, if they be left ungarrisoned, whether the Garrisons were withdrawn before or after the Truce. For the Property remaining renders the other's Possession unjust; which shews how groundless the Cavil of *Belisarius* was,

VIII. (1) *Coronaei & Haliartii, &c.* Lib. XLII. Cap. XLVI. Num. 9, 10.

^a Port, Centelles, and Albe.

who, under that Pretence, seized, during the Truce, some ^a Places from whence the *Goths* had withdrawn their Garrisons. <720>

IX. *Whether he may return that is forcibly retained during the Truce?*

IX. 1. The Query is, Whether he who being detained by some unforeseen and inevitable Accident, is found among the Enemies at the expiring of the Truce, has a Right to return? If we barely respect the external Right of Nations, his Case I do not doubt, is the same ¹ as his who coming in Time of Peace, upon the sudden breaking out of a War (not having Time to withdraw) is unhappily found among his Enemies, who, we have ^a already declared, is to continue a Prisoner till the End of the War. Neither is it against internal Justice, as the Goods and Actions of the Enemies stand obliged for the Debt of their State, and may be taken by Way of Payment. Neither has he any more Cause to complain than many other innocent Persons, on whom the Calamities of War accidentally fall.

^a B. 3. c. 9. § 4.

2. It signifies nothing to alledge here what is said of the Excuse of an unforeseen Tempest, ² which has driven a Vessel into some Place where it is subject to Confiscation. Nor that in *Cicero's* second Book of Invention, concerning a Man of War, by a Storm driven into Harbour, which the Quaestor would have sold by the Law. For those Examples relate to a Punishment which the insuperable Accident secures from; but here we do not properly discourse of Punishment; but of the Use of a Right that for a certain Time lay suspended, yet it would be far more humane, far more honourable, to release such-a-one.

IX. (1) But see what I have said against PUFENDORF, who is of the same Opinion, § 10. of the Chapter already cited several Times. Our Author, and STRAUCHIUS, who follows him, (*Cap. ult. § ult. Diss. De Induciis.*) have here departed without Reason from ALBERICUS GENTILIS, *De Jure Belli*, Lib. II. Cap. XIII.

2. *Tamen eum, qui ante Idus Martias profectus ex portu, & relates tempestate in Insulam deductus esset, si inde exisset non videri contra legam fecisse.* Digest, Lib. XXXIX. Tit. IV. *De Publicanis, & Vectigalibus, & Commissis*, Leg. XV. *Si propter necessitatem adversae tempestatis expositum onus fuerit, non debere hoc commisso vindicari, Divi Fratres rescripserunt.* Ibid. Leg. XVI. § 8.

X. There are also some Things unlawful during a Truce, from the special Nature of the Agreement. As suppose a Truce were granted only for the Burying of the Dead, ¹ nothing ought to be changed; so if a Truce be made, that the Besieged should not, ² within such a Time, be assaulted, then it would be unlawful to receive fresh Supplies of Men or Provisions. For since such a Truce is granted to oblige one Party, the other ought not to be prejudiced by it. And sometimes it is agreed in the Truce, that they shall not have Liberty to pass and repass; ³ sometimes Protection is granted to Persons, not to Things; wherefore, if in Defence of our Goods we wound any Person, it is not Breach of the Truce. For since it is lawful

X. Of the special Agreements of Truces, and what Queries usually arise from thence.

X. (1) They cannot, for Instance, retire during that Time, into a more secure Post, nor intrench themselves. PUFENDORF, in the Chapter to which I have referred several Times, is of a different Opinion, § 9. He maintains, after STRAUCHIUS, (*Diss. De Induc. Cap. V. § 4.*) that these Sort of Things, which tend solely to put one's self into a State of Defence, have nothing unlawful in them, because no one is deemed to renounce his Right to defend himself. And, adds he, it is the Fault of him who grants such Truce, if it gives the Enemy Opportunity to render himself stronger. But these Reasons, upon close Examination, prove nothing: And the late Mr. BATTIER, whom I have quoted before, has declared, with Reason, for GROTIUS, in a small Academical Dissertation, intituled, *De Induciis Bellicis*, printed in 1697. The Party, says he, that hath granted a short Truce for the Interment of the Dead, hath granted it for that Purpose only, and there is all the Reason in the World to believe, that he would not have permitted any Thing further, had it been demanded of him. And besides the Reason alledged by our Author, if, in the Time granted by the Truce for the Interment of the Dead, the Enemy endeavours to intrench himself, and we prevent him by Force, I do not see that he can have any Room to complain. Now how could one and the same Convention give one Party a Right to do a Thing, and the other to prevent it? I add, that the Right of defending one's self, which PUFENDORF speaks of, and which no one, he says, is supposed to renounce, regards only the Case wherein one is actually attacked, and not the Measures which may be taken to prevent a remote and uncertain Danger. Now the Question here relates to the latter. For the Rest, the Examples of *Tissaphernes*, from CORNELIUS NEPOS, in *Agesil. Cap. II.* and of XENOPHON, *Orat. de laud. Agesil. Cap. I. § 10, 11. Edit. Oxon.* are very apposite. But as to that of *Philip*, alledged by Mr. BATTIER, and others, after ALBERICUS GENTILIS, *Lib. II. Cap. XIII. p. 313.* it is not applicable here, but to the Case our Author speaks of in § 7. where he also alleges precisely the same Fact. He who first cited it repeats it wrong: *Se recepit*, says he, *in loca tutiora*, which LIVY does not say, but only that *Philip* decamped without Noise. *Silenti agmine abiit*, *Lib. XXXI. Cap. XXXVIII.* at the End.

2. As the *Neapolitans* obtained from *Totilas*, in PROCOPIUS.

3. See the *Decretals*, Tit. *De Judaicis. Cap. XI.*

to defend our Goods, personal Safety is to be referred ⁴ to that which is <721> principal in the Treaty, not unto that which may be deduced from it by consequence.

XI. *A Truce broken on one Side, the other may renew the War.*

^a B. 3. c. 19.
§ 14. and c. 20.
§ 35.

XI. If the Faith of Truce be broken on one Side, the other may undoubtedly proceed to Acts of Hostility, without any Declaration; for every Article of the Agreement implies a Condition, as I have said a little ^a before. We may find indeed some Examples in History, where some have bore it ought [[*sic*: right]] to the End of the Truce. But we read also that War was made upon the *Hetrurians*, and others, for Breach of Truce. From which Diversity of Examples we may infer it to be lawful for the injured Person to have Recourse to Arms; but whether he will or not is left to his own Choice.

XII. *What if a Punishment be added.*

XII. This is certain, that if the Punishment agreed on, be demanded, and be inflicted on the Transgressor, then the other Party ¹ has no Right to make War; therefore Punishment is inflicted, that other Things may continue safe. So, on the contrary, if the War be renewed, the Offender ² is acquitted from Punishment, since the other had his Choice.

XIII. *When private Acts break the Truce.*

XIII. The Actions of private Persons do not break a Truce, unless the State has some Share in them, either by an Order or an Approbation, which is also implied, if the Offender be neither punished nor delivered up, nor Restitution made.

4. By reserving a Right to pillage, when the Security of Persons on both Sides is agreed on; the Right of defending against Pillage is also reserved: And hence the Security of Persons is not general; but only for such as go and come without Intent to take any Thing from the Enemy, with whom such limited Truce is made.

XII. (1) In this Case, the Party against whom Hostilities are committed, notwithstanding the Truce, may also, besides the Penalty stipulated by it, exact Amends for what he has otherwise suffered by the Infraction of the Treaty. Mr. BATTIER makes this Remark in the Dissertation cited before, § 10. or last.

2. See PUFENDORF, *Law of Nature and Nations*, § 11. of the Chapter which answers to this.

XIV. A Right to pass and repass beyond a [[Truce]], † is a Kind of Privilege; therefore what we have already said concerning Privileges, must be observed in the interpreting of it. But this is a Privilege not hurtful to any third Person, nor very burthensome to him that granted it, therefore not to be taken in the strictest Sense of the Words, but with some Allowance, within the Propriety of the Terms. And more especially, if it were not granted upon Request, but freely offered. But still the more, if besides a private Advantage, ¹ a publick one is intended. Therefore we are to reject a strict Interpretation, tho' the Words may bear it, unless it would otherwise create an Absurdity, or that very probable Conjectures of the Intent of the Person may induce us to it. But, on the contrary, an Extension even beyond the proper Signification of the Words shall take Place, to prevent such an Absurdity, or from very reasonable Conjectures.

XIV. *Free Passage without a Truce, how to be interpreted?*

XV. Hence we gather, that a safe Pass granted to Soldiers, extends not only to inferior Officers, but also chief Commanders; because the Propriety of the Word will allow ¹ that Signification, though there is also another ² more strict. So under the Name of Clergy ³ are comprehended

XV. *Who may come under the Name of Soldiers.*

† The original English text reads "Truth" instead of "a Truce." I have corrected it following the Latin (*inducias*) and the marginal note in the English version.

XIV. (1) If, for Instance, to treat of Peace be the Matter in Question, and the Passport has been given for that End.

XV. (1) Thus, in the *Roman Law*, concerning privileged Wills, the Word *Miles*, in Opposition to that of *Paganus*, generally signifies all those who are actually upon a military Expedition, whether they command or obey, are Officers or common Soldiers.

2. According to which those who obey are called *Milites*, or *Troops*, in Opposition to *Officers*, Generals or Subalterns. This is a known Thing, and ALBERICUS GENTILIS proves it by Authorities, in his *De Jure Bell.* Lib. II. Cap. XIV. p. 321. where he decides in a different Manner from our Author, both upon this and the following Example.

3. The Word *Κληρικοί*, from whence the *Latin Clerici*, and our Words *Clerk*, and *Clergy*, are derived, included at first, that is to say, from the Beginning of the third Century, when this Custom was introduced, all publick Ministers of Religion, of whatsoever Order they were; in Opposition to *Laicks*, (*Λαϊκοί*) or simple Believers. See Mr. BOEHMER's Dissertation, *De differentia inter Ordinem Ecclesiasticum & Plebem, seu inter Clericos & Laicos*, which is the sixth of his *Dissertationes JURIS ECCLESIASTICI antiqui ad PLINIUM SECUNDUM, & TERTULLIANUM*, and the ninth Disser-

Bishops. So the Mari-^{<722>}ners⁴ in a Fleet may be called Soldiers; and all in general, who have taken the military Oath.

XVI. *To go, to come, to depart, how to be here understood.*

XVI. I. Leave given to go¹ implies also one to return; not that the Word *go* includes it of itself, but because otherwise this Absurdity would follow, that a Favour would be intirely useless. If one promises *to let us go away in Safety*, we are to understand a Permission to depart, without having any Thing to fear, till we shall be got into a Place of Security.²

tation of the same Collection, § 2. as also the fifth Chapter of his *Origines praeicipuarum materiarum Juris Ecclesiastici*, published with his SCHILTERUS *illustratus*. To which may be added, the fifth Chapter of the first Book of Mr. BINGHAM's *Antiquities of the Christian Church*, from which the learned and judicious Author of the *Bibliotheca Anglicana* has given us several curious Extracts. But in Process of Time the Term *Clerk* or *Clergy* was confined to Ecclesiasticks of an inferior Class; so that *Bishops* were not comprehended under that Name. Examples of this are very common; and to this relates a Passage of the *DECRETALS*, cited by our Author in the Margin, but which is improperly placed in the Margin of the preceding Paragraph, in all the Editions of the Original, without excepting mine, (Mr. BARBEYRAC's) where the Printers have forgot to put it in its right Place, as I had marked it in their Copy. *CLERICI sane, si contra istam formam quemquam elegerint; & eligendi tunc potestate privatos, & ab Ecclesiasticis beneficiis triennio noverint se suspenses—EPISCOPUS autem, si contra hanc fecerit, aut consenserit fieri, in conferendis praedictis Officiis & Beneficiis potestatem amittat, &c.* Lib. I. Tit. IV. *De Electione & Electi potestate*, Cap. VII. § 3. In the *CODEX THEODOSIANUS* the Bishops are called *Primi Clerici*, Lib. XVI. Tit. VIII. *De Judaeis, Caelicolis, &c.* Leg. XIII. See the learned JAMES GODOFROY, p. 228. Vol. VI. and p. 31, 32. of the same Volume.

4. *In classibus omnes Remiges & Nautae milites sunt; & jure militari eos testari posse, nulla dubitatio est.* Digest, Lib. XXXVII. Tit. XIII. *De bonorum possessione ex testamento militis*, Leg. I. § 1.

XVI. (1) There may be however some Cases in which the one does not imply the other. Let us suppose, for Instance, that a safe Conduct is granted to some Person of the Enemy's Party to *go*, not into some other Place of their own People's, but into a third or neutral Country; to *Rome*, for Example, or into *France*, when he cannot go thither without passing through the Dominions of him who grants the Passport: In that Case, if he would return by the same Rout, a new Passport is necessary; the Advantage of the first being expired. This the late Mr. HERTIUS, after others, very well observes, in his Dissertation *De Literis Commeatis pro pace*, § 13. p. 327, 328. Vol. I. *Opusc. & Commentat.*

2. This was a Blot, says PLUTARCH, that tarnished the Lustre of that Conqueror's military Actions, who, on other Occasions, made War with Justice, and in a Manner worthy of a King. (*In Vit. Alexandr.* p. 698. C. Vol. I. *Edit. Wech.*) LEUNCLAIVUS

It was therefore Treachery in *Alexander*, to cause them to be murdered in their Return home, to whom he had given Leave to depart.

2. But he that has Leave given him to go away, has not also to come back again; so neither has he that is allowed to come, a Liberty to send; nor on the contrary; for they are distinct Things, neither will Reason³ warrant us to go beyond the Words; but yet, tho' an Error cannot give any Right, it may excuse from Punishment, if any were stipulated. He also that has Leave to come, shall come but once, and not again, unless the Time allowed⁴ in the Pass gives Room to conjecture otherwise.

XVII. The Son must not follow the Father, nor the Wife her Husband; tho' when the Question is about the Right of Dwelling in a Country, the one follows the other: For we used to¹ dwell, not to travel, with our Families. But a Servant or two, tho' not particularly expressed, shall be presumed to be allowed, to him who cannot decently travel without them. For he that grants any Thing, is supposed to grant the necessary Consequents, which Necessity is here to be morally understood.

XVII. *How far a safe Conduct extends to Persons.*

XVIII. Goods likewise shall be comprehended, not all, but what are necessary for Travellers.

XVIII. *How far unto Goods.*

XIX. Under the Name of Attendants we must not understand those whose Character is more odious than that of the Person himself, whose Safety is provided for: Such as are Pirates, Robbers, Fugitives, and De-

XIX. *Who may come under the Name of Attendants, and who*

relates a like Treachery of *Bajazet* to the People of the City of *Widin* in *Servia*. Hist. Turc. Lib. VI. GROTIUS.

3. Mr. HERTIUS maintains, however, in the Dissertation which I have cited a little above, (§ 15. p. 330.) that when a Passport is given in Order to treat of Peace, as that may be done, either in Person or by another, the Party may either go himself or send another in his Place.

4. If, for Instance, it be expressed, that he may *come during six Months*, and if he can go and come several Times during that Term.

XVII. (1) *Quum precario quis rogat, ut ipsi in eo fundo morari liceat: Supervacuum est adjici, ipsi suisque. Nam per ipsum suis quoque permissum uti videtur.* Digest, Lib. XLIII. Tit. XXVI. *De Precario*, Leg. XXI. *seu penult.*

*under the Name
of a Nation.*

serters. The expressing the Name of their Country ¹ in the Passport, plainly shews that the Permission does not extend to others, who are not of that Country.

XX. *Whether a
Passport be
valid upon the
Death of the
Granter?*

XX. Licence to pass freely being derived from the Authority with which he who gives it is invested, in a dubious Case, does not cease by the Death ¹ of the Granter, <723> according to what we have said ^a before, concerning the Grants of Kings, and other sovereign Princes.

^a B. 2. C. 14. § 12.

XXI. *What if it
be given only
during the
Pleasure of the
Granter?*

XXI. It is often disputed, what is meant by this Expression in a Pass, *during my Pleasure*. And the best founded Opinion is, that it shall last till the Donor shall declare his ¹ Will to be otherwise, for that is presumed to continue, in a doubtful Case, which is sufficient to produce some Effect of Right: But not if he that granted it be disabled to will, which ² may happen by Death: For the Moment the Person ceases to be, that

XIX. (1) When, for Instance, it is expressed *with his French or German Attendants*. Our Author insinuates, that if it be only said, with his Attendants, or Followers, it does not signify of what Nation they are. By which he tacitly rejects the Opinion of ALBERICUS GENTILIS, who, in his Treatise *De Jure Belli*, Lib. II. Cap. XIV. p. 325. inclines to believe, that when the Nation is not expressed, it is supposed the Attendants or Train ought to be of his Nation to whom the Passport is given.

XX. (1) It may, however, be revoked, in my Opinion, if the Successor deem it proper for good Reasons; but in such Case it is necessary, that the Person to whom the safe Conduct has been granted, should have Notice given him to retire, and the necessary Time allowed him for removing into a Place of Safety.

XXI. (1) The Clause, *during Pleasure*, implies in itself a Continuation of safe Conduct, till it be expressly revoked, and the Change of Will thus signified, which otherwise is deemed always to subsist, whatever Time may be elapsed. This is also the Decision of ALBERICUS GENTILIS, *De Jure Belli*, Lib. II. Cap. XIV. *in fn.* where he adds another Example of the Exception, which our Author makes here after him; that is, when he who has given the safe Conduct is no longer in the Employment, by Vertue of which he was empowered to grant such Security. And indeed his Authority concluding at that Time, he is no more in a Condition to continue his good Will, than if he were dead.

2. Thus when a Person has given a Lodging in his House to another, *during his own Pleasure*, and happens to die, the Heirs may turn the other out of the House; as it is determined in a Law, explained according to the Correction of a great Man, Mr. ANTHONY FAURE, (*Conject. Jur. Civ.* Lib. II. Cap. XIX. LUCIUS TITUS *epistolam talem misit*: Ille illi salutem. Hospitio illo, quamdiu voluero [so this learned Civilian reads

Presumption of a Continuance of his Will falls of itself, as Accidents vanish as soon as the Substance is destroyed.

XXII. But a safe Pass is a Security to him who has it, even beyond the Territory of the Granter, because it is granted by Way of Protection against the Right of War, which of itself is not confined to any particular Prince's Dominion, as we have said ^a in another Place.

XXII. *Whether Security be allowed beyond the Territory of the Donor?*

^a B. 3. ch. 4. § 8.

XXIII. The Redemption of Prisoners is a Thing very favourable, especially amongst Christians, to whom the divine Law particularly recommends this Kind of Mercy. ¹ *The Redemption of Prisoners is a great and signal Part of Justice*, says *Lactantius*. To redeem Prisoners, especially from a barbarous Enemy, is called by St. *Ambrose*, ² the most noble and highest Liberality. The same Author defends his own and the Churches Fact, in selling even the consecrated Vessels to redeem Prisoners. *The greatest Ornament of Sacraments*, says he, is ³ *the redeeming of Captives*: And many other Things to the same Purpose.

XXIII. *The Redemption of Prisoners favourable.*

it, for *volueris*] utaris, superioribus diaetis omnibus gratuito: Idque te ex voluntate mea facere, hac epistola tibi notum facio. *Quaero, an haeredes ejus habitationem prohibere possunt? Respondit, secundum ea quae proponerentur Haeredes ejus posse mutare voluntatem.* Digest. Lib. XXXIX. Tit. V. De Donationibus, Leg. XXXII. This is very clearly expressed in another Law: *Locatio, precariive rogatio, ita facta*, quoad is, qui eam locasset, dedissetve, vellet, *morte ejus, qui locavit, tollitur.* Lib. XIX. Tit. II. *Locati conducti*, Leg. IV. See Cardinal TUSCHUS, *Pract. Conclus.* 751. lit. p. REINKING, *Lib. II. Class. II. Cap. VIII. Num. 30.* GROTIUS.

XXIII. (1) *Captivorum redemptio, magnum atque praeclarum justitiae munus est.* Inst. Divin. *Lib. VI. Cap. XII. Num. 15. Edit. Cellar.*

2. *Praecipua est igitur liberalitas, redimere captivos, & maxime ab hoste barbaro, &c.* De Offic. *Lib. II. Cap. XV.*

3. *Ornatus sacramentorum, redemptio captivorum est.* Ibid. *Cap. XXVIII.* St. AUSTIN imitated this Action, as POSSIDIUS relates, who says, that some worldly Persons did not approve it. (*De Vita Augustin.* Cap. XXIV.) Another Bishop of *Africa*, named *Deo-gratias*, did the same Thing, as VICTOR UTICENSIS informs us, *Lib. I. HINCMAR*, in his Life of St. *Remigius* relates, that a consecrated Vessel, which had been that Prelate's, was given to ransom Prisoners taken by the *Normans*. MARK ADAM, in his Ecclesiastical History of *Bremen*, relates a like Action of *Rembert*, Archbishop of that City. The sixth, or rather eighth, General Council approved such a Use of consecrated Vessels; and the Decree thereupon has been inserted in the *Canon Law*, Caus. XII. Quaest. II. Can. XIII. GROTIUS.

XXIV. *Whether such a Redemption can be forbidden by any Law, explained.*

XXIV. I. I dare not then approve, without Restriction, those Laws which forbid the ransoming of Prisoners, as we may read ¹ of among the *Romans*. No <724> *State so negligent of Captives as ours*, ² said one in the *Roman Senate*. And *Livy* says, that in the most antient Times *Rome* had no Compassion for those who were fallen into the Hands of the Enemy. The Ode ³ of *Horace* is well known on this Subject, where he calls the redeeming of Prisoners a shameful Condition, and an Example of dangerous Consequence, a Loss added to the Cowardice of the redeemed Prisoner. But what *Aristotle* condemns in the *Spartan Government*, is generally blamed in the *Roman*; namely, that every Thing in it related too much to warlike Affairs, as if the Safety of their State consisted only in them. But if we would consider it according to Humanity, it were better sometimes to renounce all the Pretensions for which War is un-

XXIV. (1) The learned BOECLER, in his Dissertation, intitled, *Miles Captivus*, (Vol. I. p. 981.) criticises our Author upon this Place. There are, says he, no other *Roman* Laws, that prohibit the ransoming of Prisoners, but those of the military Discipline, the Violation of which was punished in that Manner. There is not one that forbids entirely the ransoming of Prisoners: But when the *Roman* Soldiers were taken by the Enemy, it was examined, whether they had observed the Laws of military Discipline, and in Consequence, whether they deserved to be ransomed. It is true the Side of Rigour generally prevailed; as that which was thought most advantageous to the Republick; from the Persuasion, that many had fallen into the Enemy's Hands, only in Consequence of some Fault contrary to their Engagements. This is all the Passage cited by GROTIUS proves; and *T. Manlius Torquatus*, in opposing the ransoming of Prisoners, speaks only of an antient Custom. *Ut morem traditum a patribus, necessario ad rem militarem exemplo, servaretis*. LIVY, XXII. 60. Num. 7. Whether the Laws themselves of the *Roman* military Discipline were not too rigorous, is a different Question.

2. *Nemo nostrum ignorat, nulli umquam civitati viliores fuisse captivos, quam nostrae*, &c. LIVY, *Lib. XXII. (Cap. LIX. Num. 2.)* See another Passage of the same Author, [quoted above, *Chap. IX. of this Book, § 4. Num. 2.*]

3. *Dissentientis conditionibus
Foedis, & exemplo trahenti
Perniciem veniens in aevum.*
* * * * *

————— ————— *Flagitio additis*
Damnum. —————

(Lib. III. Od. V. ver. 13. & seq. 26, 27.) GROTIUS.

dertaken, than to leave so many Men, either our Kindred or Countrymen, unto intollerable Slavery. [[⁴]]

2. Such a Law then cannot be esteemed just, unless there appear a Necessity for that Severity, purely to prevent greater, or more numerous Calamities, which are otherwise morally unavoidable. For in such a Necessity, as the Prisoners themselves, by the Law of Charity, should patiently bear their hard Fortune, they may be laid under an Obligation to it, and others prohibited to do any Thing to draw them from it, according to what we have ^a said in another Place, that a Citizen may be delivered up for the Good of the Publick.

^a B. 2. Ch. 25.
§ 3.

XXV. Prisoners taken in War are not made Slaves, by our Laws or Customs. Yet I doubt not, but that Right of demanding a Ransom from one so taken, may be transferred by the Captor to another, for Nature allows even incorporeal Things to be alienated.

XXV. *The Right in a Prisoner may be transferred.*

XXVI. And the same Person may be indebted for his Ransom to several Men; as if discharged by one, before he paid his Ransom, he be taken by another; for these are distinct Debts, from distinct Causes.

XXVI. *The Ransom of one may be due to more than one.*

XXVII. An Agreement made for a Ransom cannot be made void, because the Prisoner is found to be much richer than he was thought to be; because by the ¹ external Right of Nations, which is now the Matter in Question, no Man may be compelled to give a greater Price than what he first agreed for, if there was no Cheat in that Contract; as may be easily understood from what I have said ^a already concerning Agreements.

XXVII. *Whether the Ransom agreed upon may be made void, if the Estate of the Person be then unknown.*

^a B. 2. ch. 12.
§ 26.

4. [[Footnote number missing in English text, supplied from Latin edition.]] The Emperor *Maurice* seriously repented an Inhumanity of the same Kind, which he had committed. See ZONARAS, in his Life. GROTIUS.

XXVII. (1) It suffices to say, that the Circumstance of the Prisoner's having more or less Riches, has no Relation to the Engagement. So that if his Ransom was to be settled by his Worth, that Condition should have been put in the Contract.

XXVIII. *What
Goods of a
Prisoner belong
to the Captor.*

^a B. 3. Ch. 7.
§ 4.

XXVIII. From what has been said already, that Prisoners are not now made Slaves, it follows, that we do not acquire all their Goods in general, as was done formerly, in Consequence of the Right of Property, which one had over their Persons, as we have said ^a in another Place. The Captor then has Right to nothing but what he actually takes; wherefore, if the Prisoner can hide any Thing from him, it is none of the Captor's, because he is not possessed of it. As *Paulus* the Lawyer decides, against *Brutus* and *Manilius*, ¹ he that seizes upon a Field, cannot be said to possess the Treasure that is buried there, because he knows not of it; for no Man can possess what he knows not of; whence it follows, that what is so concealed may help to pay for his Ransom, ² he having still kept the Property of it. <725>

XXVIII. (1) *Caeterum quod BRUTUS & MANILIUS, &c.* Digest, XLI. Tit. II. *De adquir. vel amitt. possess.* Leg. III. § 3. See CUJAS upon this Point, *Recit. in Paulum, ad Edictum*, Vol. V. Opp. p. 748.

2. When Prisoners of War became Slaves, as, according to the received Custom, the Master acquired a Right of Property both over their Persons and Estates; it was not necessary, that he should actually take Possession of all they might have, or even have Knowledge of it, provided he could seize it, when discovered: The Intention of appropriating to himself all the Goods known or unknown of his Prisoner, was evident, and a natural Consequence of the Thing; as when a Person acquires an Estate in Land, where there may be many Things which have a natural Dependence upon it. But the Case is different amongst us, with whom the Custom of Slavery is abolished. Whatever desire we may have to take and appropriate all that belongs to a Man we have made Prisoner of War, we have no other Right over his Person, than to detain it till a Ransom be paid, or Peace concluded. So that we may search, rifle, and appropriate all we can find, that belonged to him; but if we have neglected to make the necessary Search, or the Prisoner, who is under no Obligation to declare all he has, has found Means to conceal something from us; there is then no Acquisition of that Thing; neither is it acquired as a natural Dependence of some other Thing, as the Prisoner does not belong to him, who took him. So that the Example of the Treasure, unknown to the Master of the Land, is very proper here. And further: Let us suppose that before any Agreement concerning Ransom, the Person, in whose Possession the Prisoner is, discovers some Effects belonging to the Prisoner in the Hands of a third Person, but which this third Person has found either amongst the Booty made in plundering, or in the Hands of another Prisoner, whom he has taken himself: Will any Body say, that these Effects may be reclaimed by the former, upon Pretence that they belonged to his Prisoner? So that ZIEGLER's Criticism is no better founded here, than almost every where else. I must say the same of the late Mr. HERTIUS's Thought, who in his Dissertation *De Lytro*, (Sect. II. § 30. p. 287. Vol. I. Opusc. & Comm.)

XXIX. I. There is also another Query, whether a Ransom agreed upon, and not paid before the Prisoner's Death, is to be recovered from the Heir; the Answer is easy in my Opinion: If he died in Prison there is nothing due, for the Agreement was made upon Condition that he should be set at Liberty; but he that is dead cannot be so. On the contrary, if he die, being set at Liberty, it shall be due; because he had already gained that for which the Ransom was promised.

2. I freely own, that the Contract may be so made, that the Ransom shall be simply due from the very Moment of the Contract, and the Captive shall still be detained, not as a Prisoner of War, but as one engaged for himself. So, on the contrary, the Covenant may be so made, that the Money of the Ransom shall be only then due, if the Prisoner be alive, and at Liberty, upon a Day prefixed. But such Sort of Clauses not being very natural, are not presumed, without evident Proofs.

XXIX. *Whether the Heir be chargeable with the Prisoner's Ransom.*

XXX. Here is one Query more, whether he is obliged to return to Prison, who was released on Condition of releasing another, if that other die

XXX. *Whether he that is released to free*

tho' he falls in with that Commentator in regard to the pretended Acquisition of Effects unknown, approves however our Author's Decision, and makes it extend even to Prisoners of War, who actually become Slaves. His Reason is, that he who treats with his Prisoner, does thereby declare, that he is contented with the Ransom he requires of him: Whence he is deemed from thenceforth to have lost Possession of the Effects, which he had acquired with the Person; and much more, of those which he had acquired without acquiring at the same Time a Right of Property over the Person. But he who treats for Ransom with his Prisoner, intends certainly to gain something: He would gain nothing, if the Prisoner only gave him what he has already. Thus if we suppose, that even the concealed Effects belonged to him, it is evident he must have treated only under this Condition, that there shall be nothing of that Kind in what is given him for the Ransom: So that the Condition not being performed, the Agreement falls to the Ground of course. For this Reason, the Decree of *Scanderbeg*, which PUFENDORF also repeats, *B. VIII. Chap. VII. § 12.* is rather a favourable Decree, passed in Consideration of the unhappy Condition to which Persons are reduced by Slavery, than a Sentence founded upon the Rigour of Law. For as that famous Captain made War with the *Turks*, he had a Right to authorize, and undoubtedly did authorize, by way of Reprisals, the Slavery of the Prisoners of War.

another ought
to return, the
other being
dead.

^a B. 2. ch. 2.
§ 22. and ch.
15. § 16. B. 3.
ch. 20. § 58.

before the Releasement. I have proved ^a elsewhere, that in regard to gratuitous Promises, the Promiser has performed his Word, if he has omitted nothing to engage a third Person to do such or such a Thing; but a Promise being made upon a valuable Consideration, the Promiser stands obliged to the full Value, that he promised. So in this very Case, he that is released, is not obliged to return into Custody; for that was not stipulated in the Agreement: And Liberty is a Cause too favourable for presuming a tacit Convention. But neither ought the Prisoner to enjoy Liberty for nothing; but shall ¹ pay the Value of what he could not perform. For this is more agreeable to the Simplicity of natural Right, than what the Expositors of the *Roman* Laws have delivered unto us concerning an Action *Praescriptis verbis* (*in prefixed Terms*) or a personal Action, ² *Ob causam datam, causâ non secutâ* (*for a Thing given and a Thing not following*). <726>

XXX. (1) This *Paul Balioni* did not do, who was released upon Condition of setting Cardinal *Carvajali* at Liberty, who died whilst a Prisoner. And *MARIANA, Hist. Hisp.* Lib. XXX. blames *Balioni* for having acted in that manner. But *PARUTA, Lib. II.* relates the Fact with some little Difference. *GROTIUS.*

See further, upon the same Case, which happened to a *Venetian* General taken by the *Spaniards*, *PAULUS JOVIUS, Hist. Lib. XII. Vol. I. p. 203. Edit. Basil. 1556.* where he is called *Balconus*.

2. As thus. A Person has given a Thing, in order to have another for it. He who was to give it, fails, whether he be able to give it, or not being able, he is or is not in Fault: In this Case, the other contracting Party may either bring his Action *praescriptis verbis*, for Damages and Interest, or redemand what he has given, even tho' the Thing, he ought to receive, has perished by some fortuitous and inevitable Accident; as well because he had given what was his with the View of something he has not had, as because in this Kind of Contracts, which had no proper and peculiar Name, he who had begun the Execution in this Manner, was at Liberty to retract, before the other had performed his Engagements. See *Digest, Lib. XIX. Tit. V. De Praescriptis verbis, &c. Leg. V. § 1. and Lib. XII. Tit. IV. De conditione causâ datâ causâ non sequuta, Leg. ult.* Laws cited by our Author in the Margin. The Reader may consult Mr. *NOODT, Probabil. Jur. Lib. IV. Cap. IV. and V.* where he learnedly and judiciously explains, according to his Custom, these Laws which are both difficult, and one of them corrupt in one Place. See also what I have observed, upon *B. II. Chap. XII. § 3. Num. 3.* According to these Principles of the *Roman* Lawyers, the Person who has released a Prisoner of War in the Case in question, would have a Right to oblige that Prisoner to return into Captivity after the Death of the other.

Concerning the Faith of inferior Powers in War.

I. Among publick Agreements *Ulpian* ¹ reckons this as one, *When the Generals of each Army agree some Things between themselves.* I promised, that after having discoursed on Faith given by Sovereign Powers, to say something of that given by Inferior ones, either between themselves, or unto others; whether those Powers be immediately next to the Sovereign, such as Generals, so called by way of Excellency; to which we may apply that of *Livy*, ² *We allow no other as General, but he to whose Conduct the whole War is committed;* or those of a lower Rank, whom *Caesar* thus

I. *The several Kinds of Commanders.*

I. (i) *Publica Conventio est, quae fit per pacem, quotiens inter se Duces belli quaedam paciscuntur.* Digest, *Lib. II. Tit. XIV. De Pactis.* See upon this Law, the fine Treatise of Mr. *NOODT*, *De Pactis*, Cap. VII. where he shews, that *aut quotiens, &c.* should be read with some antient Editions, so that there are two different Examples in this Place; the one of Conventions made when a Peace is treated of; the other of those made during a War between the Generals of the two opposite Armies. It must be confessed however, that the Words, *quae fit PER PACEM*, so explained, have something very stiff in them, as Mr. *SCHULTING* observes, *Enarrat. in primam partem Pandectarum*, ad *Tit. De Pactis*, § 2. I find in the Dissertation of a learned *German* Civilian, named *STRAUCHIUS*, (*De Induciis*, Cap. III. § I.) which I have cited upon the preceding Chapter, an overture, of which use may be made here in joining to it the Particle *aut*, that he did not think of. He conjectures, that *ULPIAN* intended to distinguish two Sorts of *publick Conventions*: The one made during Peace, or between those who live in Peace with each other; the other, made during a War, wherein the Generals usually treat in the Name and by the Authority of the State, for which they command. Upon this Foot the natural Signification of the Terms, *per pacem*, is preserved in all the Purity of the *Latin* Tongue.

2. *Nec duces novimus, nisi sub cujus auspicio bellum geritur.* *Lib. IV. (Cap. XX. Num. 6.)*

distinguishes, ³ *The Duty of a Lieutenant General is one Thing, and that of a Commander in Chief another. The one is to execute Orders, the other to do whatever he judges proper for the Management of Affairs.*

II. *How far an Agreement made by them obliges the Sovereign Power.*

^a *B. 2. ch. 2. § 12.*

II. There are two Things to be examined with respect to their Engagements. As whether they thereby engage the supreme Power, or whether themselves. The former ¹ Query may be determined by what I have said ^a elsewhere, *viz.* That we are obliged by those whom we depute to be Ministers of our Wills, whether that Will be specially expressed, or gathered from the Nature of their Commission. For he that grants a Power, grants, as much as he can, all Things necessary to the Exercise of that Power, which in moral Things is to be morally understood. Inferior Commanders therefore may bind their Sovereigns two several Ways, either by doing that which they think is probably included in their Office, or by doing that which belongs not to it, yet have a special order to do it, which is either publicly known, or to those with whom they treat.

III. *Or gives Occasion to such an Obligation.*

^a *B. 2. ch. 4. § 5. and ch. 15. § 17.*

III. There are also other ways, whereby a Sovereign Power may be obliged by the previous Facts of his Ministers, but yet not so, that that Fact is the proper Cause <727> of that Obligation, but only the Occasion of it; and that two Ways, either by consenting to it, or by the Thing itself. Their Consent will appear by their Ratification, which may be not only express, but tacit; that is, when the Sovereign had Knowledge of what passed, and yet permitted Things to be done, which cannot probably be referred to any other Cause, than the Execution of the Engagements contracted without his Participation. In what manner, and how far, this Approbation may be presumed, we have ^a shewed in another Place. By the Thing itself he may be so far obliged, as not to enrich himself by another's Loss; that is, either that he perform the Agreement, by which

3. *Aliae enim sunt Legati partes, aliae Imperatoris: Alter omnia agere ad praescriptum, alter libere ad summam rerum consulere debet.* Comm. de Bell. Civil. Lib. III. Cap. LI.

II. (i) See CAMBDEN, upon the Year 1594. where he relates the Sentence of Count *Miranda* in the Affair of *Hawkins*, (p. 629. & seq. *Edit. Amst.* 1625.) GROTIUS.

he is willing to receive a Benefit, or quit that Benefit; of which Equity I have also ^b treated elsewhere. And thus far, and no farther, that Saying holds true, *Whatever brings Profit, is binding*. On the contrary, we must condemn them of Injustice, who refuse to perform the Agreement, and yet still retain that, which they could never have had without the Agreement; as when the *Roman* Senate could neither approve the Fact of *Cn. Domitius*, nor would make it void, as *Val. Maximus* ¹ observes: We meet with many such Examples in History.

^b *B. 2. ch. 10.*
§ 2.

IV. 1. And here we must repeat what we have formerly ^a said, *viz.* that the Sovereign is obliged by the Fact of his Agent, tho' he act contrary to his private Instructions, provided he keep within the Bounds of his publick Office. The *Roman* Praetor well observed this Equity in Actions relating to Factories. For not every Contract made by a Factor, ¹ binds the Person that employs him, but such only as regard the Affairs for which he is appointed Factor; but ² if it be publickly notified, that no Man should henceforward contract with him, he shall not be any longer treated with as an Agent. But tho' such a Declaration be made, ³ yet if it be not known to the Contractors, he that employed him shall be

IV. *What if any Thing be done contrary to Command? This explained by Distinctions.*

^a *B. 2. ch. 2.*
§ 12, 13.

III. (1) *Cneus Domitius* had taken by Treachery, and carried to *Rome*, *Bituitus* King of *Auvergne*. The *Roman* People did not approve that Action: However they would not set the King at Liberty, lest upon his return Home, he should renew the War. *Cujus Factum Senatus neque probare potuit, neque rescindere voluit, ne remissus in patriam Bituitus bellum renovaret.* Lib. IX. Cap. VI. Num. 3.

IV. (1) *Non tamen omne quod cum institore geritur obligat eam qui praeposuit: Sed ita, si ejus rei gratiâ, cui praepositus fuerit, contractum est, id est, dumtaxat ad id, ad quod eum praeposuit.* Digest, Lib. XIV. Tit. III. *De Institoria Act. Leg. V.* § 11.

2. *De quo palam proscriptum fuerit, ne cum eo contrahatur, is praepositi loco non habetur.* Ibid. *Leg. XI.* § 2. *Proscribere palam, sic accipimus, claris literis, unde de plano rectè legi possit: ante tabernam scilicet, vel ante eum locum, in quo negotiatio exercetur: Non in loco remoto, sed in evidenti,* § 3.

3. Whether the Bill fixed up be writ in such a Manner, as it cannot be well read, or has been taken away, or spoiled by the Rain, or some other Accident: *Proscriptum autem perpetuo esse oportet. Caeterum si per id temporis, quo propositum non erat, vel obscurâ proscriptione, contractum: Institoria locum habebit. Proinde si dominus quidem mercis proscriptisset, alius autem sustulit, aut vetustate, vel pluvia, vel quo simili, contingit, ne proscriptum esset, vel non pareret: Dicendum, eum, qui proposuit, teneri.* Ibid. § 4.

obliged. It must likewise be considered, ⁴ on what Foot the Factor was appointed: For if he was ordered to treat under certain Conditions, or by the Intervention of a certain Person, he ought necessarily to follow the Method prescribed him; in Default of which, we have a Right to disown what he has done.

2. Whence it follows, that Kings or People, some more, some less, may be bound by the Contracts of their Generals, if their Laws and Constitutions be sufficiently known. But if they be not well known, we must follow the most probable Conjectures, which always suppose that to be within their Power, without which they cannot well discharge the Functions of their Office.

3. If a publick Minister exceeds his Commission, and promise more, than he can perform, he himself shall be bound to full Restitution, unless some well known Law shall hinder it. Or if there be any Deceit in it, as if the Minister should pretend to a greater Power than really he has, he shall then be bound also to make Satisfaction for the Damages consequent thereto; nay, he may be punished for his Deceit, in Proportion to the Greatness of the Crime. In the former Case his Goods are liable to make a Recompence, but if they are not sufficient, his Service or corporal Liberty. In the latter also, his Person or his Goods, or both, according to the Greatness of his Crime: But as to what I have said of Deceit, it will not be enough in Case of it, to declare beforehand, that he will not oblige himself, for both Satisfaction for Damages received, and Punishment for an Offence committed are due, ⁵ not by a voluntary, but by a natural Connection.

4. *Conditio quoque praepositionis servanda est: Quid enim si certa lege, vel interventu cujusdam personae, vel sub pignore, voluit cum eo contrahi, vel ad certam rem? Aequissimum erit, id servari, in quo praepositus est.* Ibid. § 5.

5. It is not so much for this, as because the other Party supposed in treating, that the publick Minister acted with Integrity, without which he would have been far from treating. Otherwise, if he had been so imprudent to treat, tho' he knew the Minister assumed more Power than he actually had: Whatever Knavery the latter was guilty of the other Party, because he knew it, and yet acquiesced in the Minister's Protestation, would have renounced his Right to exact any Punishment or Amends; and ought to be deemed to have been willing to risk the Default of the necessary Ratification.

V. But because in all such Agreements either the Sovereign, or his Ministers, stands obliged, therefore by Consequence the other Party stands engaged likewise, neither can it be said the Contract is imperfect. Thus we have done with the comparing the inferior Powers to their Superiors.

V. *In such a Case whether the other Party stands obliged?*

VI. Let us also see, what Power they have over their Inferiors; neither is it to be doubted, but that a General may oblige his Soldiers, and a Magistrate those of his Town, as far as the Power they generally have to command them extends; for as to other Things, there must be a Consent on their Part. On the contrary, an Agreement made by a General or Magistrate in Things merely advantageous, shall always turn to the Profit of the Inferiors; for that is plainly included in the Power of the Superior, and in such Things as may be burthensome, provided those Burdens are usually exacted, but otherwise not without their Acceptance: Which Things agree to what we have ^a already established concerning the Effect which, according to the Law of Nature, a Stipulation has in favour of a third Person. But these Generals will be more clearly illustrated by handling of the Particulars.

VI. *What the Generals in War, or Magistrates may do concerning their Inferiors, or for them.*

^a B. 2. ch. 2. § 18.

VII. ¹ It does not belong to a General to examine the Causes, or Consequences of a War, for it is his Business to manage the War, not to conclude it, no, tho' he has an unlimited Power in his Commission, that being only understood of the Conduct of War. *Agesilaus* thus answered the *Persians*, ² *It was only in the Power of the State to make Peace. Therefore the Roman Senate made void that Peace, which Albinus made with King Jugurtha, as Salust* ³ *tells us, because it was made without the Order of the Senate. And in* ⁴ *Livy, How can that Peace be established, which is made*

VII. *It is not in the Power of Generals to make a Peace.*

VII. (1) *Belisarius* told the *Goths*, that he had no Power to dispose of the Emperor's Affairs. PROCOP. *Gotthic*. Lib. II. (Cap. VI.) GROTIUS.

2. PLUTARCH, in *Agesil*. p. 601. B.

3. *Senatus, ita uti par fuerat, decernit*, suo atque Populi injussu nullum potuisse foedus fieri. *Bell. Jugurth*. Cap. XLIII. *Edit. Wass*. The Words, which our Author repeats in *Italick* Letters, as that Historian's, are not his.

4. *Aut cui rata ista pax erit, quam sine Consule, non ex auctoritate Senatûs, injussu Populi Romani, peregerimus?* Lib. XXXVII. Cap. XIX. Num. 2.

without the Authority of the Senate, or Decree of the People of Rome? Therefore the Treaty made at the *Furcae Caudinae*, and at *Numantia*, did not bind the People of *Rome*, as we have ^a shewed in another Place. And thus far is that of *Posthumius* true, ⁵ *If there be any Thing to which the People may be obliged, they may to all Things*; that is, those Things that do not belong to the Conduct of War; and this is evident from what that General had said just before concerning Conventions, whereby one should engage that the City of *Rome* should surrender, or that the *Romans* should abandon it, or set Fire to it; or that they should change the Form of their Government.

^a *B. 2. ch. 15.*
§ 16.

VIII. *Whether he may grant a Truce? This is distinguished.*

VIII. ¹ To grant a Truce is in the Power not only of a General, but of inferior Commanders, that is, unto those whom either they attack or besiege, as far as it concerns <729> them, and the Forces under their

5. *Si quid est in quod obligari Populus possit, in omnia potest.* LIVY, *Lib. IX. Cap. IX. Num. 7.*

VIII. (1) PUFENDORF with Reason excepts such Truces, as Occasion all the Resemblance of War to disappear entirely, and come very near a real Peace: *Law of Nature and Nations*, B. VIII. Chap. VII. § 13. In my Opinion, those should be also accepted, which, continuing the Appearance of War, are made for any considerable Time. This is the Thought of AYALA, *De Jure & Officiis Bellicis*, Lib. I. Cap. VII. Num. 6. and of ALBERICUS GENTILIS, *De Jure Belli*, Lib. II. Cap. X. § 288, 289. and *Cap. XII. p. 305.* See also Mr. VITRIARIUS, *Instit. Jur. Nat. & Gent.* Lib. III. Cap. XV. Quaest. IX. And certainly Truces of this Kind are of too great Consequence to be left entirely to the Discretion of a General of an Army. Besides, Circumstances are not always so urgent, as not to admit of Time for consulting the Sovereign, which a General ought to do as much as possible, both for the good of the Publick, and his own Interest, even in regard to Things, which it may be in his own Power to transact. Amongst the *Romans*, Truces of any Length were never granted but by the Senate and People. There have been Nations (as the late Mr. BATTIER observes in his Dissertation *De Induciis Bellicis* which I have cited upon the preceding Chapter) who would not give their Generals Power to make any Truce, tho' for a short Time. So *Agis*, King of *Lacedaemon*, on one Side, and *Thrasyllus* with *Alciphron*, Generals of the *Argives*, on the other, having concluded a Truce for four Months, it was declared void by both States: And the *Lacedaemonians* were so much offended at *Agis* for having taken that Liberty, that they decreed he should do nothing for the future without the Participation and Consent of ten Counsellors, whom they nominated. This is in THUCYDIDES, *Lib. V. Cap. LIX. LX. LXIII.* Edit. Oxon. and not in DIONYSIUS HALICARNASSENSIS, *Lib. II.* which Mr. BATTIER cites here, § 3. not being aware that AYALA, upon whose Authority he undoubtedly repeats it, (for he gives, as

Command. For they cannot thereby oblige ² other Commanders who are equal to them, as the History of *Fabius* and *Marcellus* in *Livy* informs us.

IX. 1. It is not in the Power of Generals to release Persons or dispose of Sovereignties, or Lands gained in a War; upon which Account *Syria* was taken from *Tigranes*, ¹ tho' *Lucullus* had bestowed it upon him; neither could *Masinissa* release *Sophonisba*, whom he had taken in War,

IX. What Protection of Persons, or Things, may be granted by them.

he does, the Name of *Thrasylulus* to one of the Generals of the *Argives*, whereas his Name was *Thrasyllus*) that *AYALA*, I say, only cites that *Greek* Historian of the *Roman* Antiquities, to prove that the Kings of *Lacedaemon* were not absolute.

2. And much less, upon this Foot, superior Officers and Commanders in Chief. So that, if after the Truce be granted, and during its Continuance, some other Commander finds Occasion for attacking, with the Hope of good Success, the Enemy, who relies upon the Faith of the Treaty for Suspension of Arms; he may do it without Scruple or Treachery, according to the Principle of our Author. But Mr. *BATTIER* seems to have Reason to declare himself against this Opinion in the Dissertation I have cited, § 4. And indeed, as it is with the tacit Consent of the Sovereign, that the Truce has been made, as that was included in the Extent of the Power of him who granted it; no other Minister can break the Agreement, without indirectly injuring the Sovereign's Authority. Besides, this may make way for Fraud and Distrusts, that might tend to render the Use of Truces, so necessary on many Occasions, useless and impracticable. For there would be Reason to apprehend perpetually the Being surprized during that Time by some other Body of the Enemy's Army: And even he himself, who has granted the Truce, might underhand Cause other Troops of his Party to come, and attack the Enemy, lulled asleep on the Faith of the Agreement made with him. Let us add to this another Reason from *ALBERICUS GENTILIS*. The General, says he, who commands an Army in Chief, may certainly oblige the Sovereign, by the Treaties which he makes, as to what regards the Conduct of the War intrusted to him: Wherefore then may not one of his Lieutenants oblige the General himself, by the Conventions which he makes within the Extent of his Office? *De Jure Belli*, Lib. II. Cap. X. p. 289.

IX. (1) It was not *Tigranes*, that was deprived of *Syria*, but *Antiochus*, the Son of *Antiochus Pius*, and Grandson of *Antiochus Cyzicenus*; as appears from *JUSTIN*, whom our Author cites in the Margin: *Igitur Tygrane a Lucullo victo, Rex Syriae Antiochus, Cyziceni filius, ab eodem Lucullo adpellatur. Sed quod Lucullus dederat, postea ademit Pompeius, Lib. XL. Cap. II. Num. 2, 3.* Besides, as *GRONOVIVS* observes, *Pompey* had no more Right to take *Syria* from *Antiochus*, than *Lucullus* to give it him. According to the Rules of Right and the Laws, the Act of both the one and the other ought to have been ratified by the *Roman* Senate and People. See that learned Person's Note. So that the Example is not proper.

² for *Scipio* maintained, that she was under the Power, and at the Discretion of the People of *Rome*: But as to other Things, which are by way of Prey, the General has some Power given him to dispose of them, yet not so much by Virtue of his Authority, as from the Custom of each Nation, of which we have said ^a enough before.

^a B. 3. ch. 6.
§ 15.

2. But as to Things not as yet actually possessed, it is certainly in the General's Power to grant or leave them; because in War many Cities and Men often surrender themselves, upon Condition of preserving their Lives or Liberties, or sometimes their Goods, concerning which the present Circumstances do not commonly allow so much Time as to consult the Sovereign. By a Parity of Reason, this Right ought to be granted to inferior Commanders concerning Things within the Extent of their Commission. *Maharbal* in the Absence of *Hannibal* had promised to some *Romans* that had escaped at the Battle of *Thrasymene*, to give them not only their Lives, as *Polybius* ³ too concisely expresses it, but also, upon delivering up their Arms, to let them depart every one ⁴ with a Suit of Cloaths. *Hannibal* detained them under Pretence ⁵ That *Maharbal* had not Power to grant such Security, without his Approbation, to People that surrendered themselves. And *Livy* censures his Action thus. ⁶ *Hannibal* kept his Faith like a true Carthaginian.

3. Wherefore let us consider *M. Tully* rather as an Orator, than a Judge, in the Cause of *Rabirius*. He would argue that *Saturninus* was lawfully killed by him, tho' *Marius* the Consul had got him out of the

2. And *Syphax*, her Husband: *Et regem [Syphacem] conjugemque ejus—Roman oporteret mitti, ac Senatus Populique Romani de ea judicium atque arbitrium esse.* LIVY, Lib. XXX. Cap. XIV. Num. 10.

3. Lib. III. Cap. LXXXIV.

4. *Fidem dante Maharbale—si arma tradidissent abire cum singulis vestimentis passurum, sese dederunt, &c.* LIVY, Lib. XXII. Cap. VI. Num. II.

5. POLYB. ubi supra, (Cap. LXXXVI.) *Bajazet* made Use of as frivolous an Evasion in a like Affair, against the People of *Crottovo* in *Servia*, as LEUNCLAVIUS relates, Lib. VI.

6. *Quae Punicâ religione servata fides ab Hannibale est, atque in vincula omnes conjecit.* Ubi supra, Num. 12. seu fin.

Capitol upon Promise of Life. ⁷ *How could <730> Faith* (says he) *be given, without a Decree of the Senate?* And so would infer, that the Faith given by *Marius* did only oblige himself; but *C. Marius* was empowered by the Senate to do whatever he should judge proper for maintaining the Empire and Majesty of the *Roman* People. This was the greatest Authority that could be ⁸ given according to the Custom of the *Romans*: And who can say that it did not include the Right of granting Impunity to any one, if that were absolutely necessary for the Security of the State?

X. But in these Agreements made by Generals, because they act for another, the strictest Interpretation is to be taken, as far as the Nature of the Contract will allow, that by their Fact their Sovereign be not more obliged than he is willing, or themselves suffer Damage in doing their Duty.

X. *Such Agreements are to be taken in a strict Sense, and why.*

XI. So he that is accepted of by a General upon an absolute Surrender, shall be judged to yield himself wholly to the Will of the Conqueror, whether of the King or People. An Instance of which we have in *Gentius*, King of *Illyria*, ¹ and *Perseus* of *Macedon*, of which the former yielded to *Anicius*, the other to *Paulus*.

XI. *How a Surrender accepted by a General is to be understood.*

XII. Wherefore the adding of this Caution, *It shall be established if the Sovereign ratify it*, which we often find in Agreements, will provide, that if the Agreement be not allowed by the Sovereign, the General himself shall be bound to nothing, except so far as he has reaped an Advantage by the Convention.

XII. *How that Caution is to be understood, if the King or People please.*

XIII. And they who have engaged to deliver up a Town, may dismiss their Garrisons, as we read the *Locrians* did.

XIII. *How the Promise of delivering up a Town is to be understood.*

⁷ *Ac, si fides Saturnino data est—non eam C. Rabirius, sed C. Maxius dedit: Idemque violavit, si in fide non stetit. Quae fides, Labiene, qui potuit sine Senatus-consulto dari?* Orat. pro *C. Rabirio*, Cap. X.

⁸ See SALLUST, *Bell. Catilin.* (Cap. XXX. Edit. Wass.) There is in GUICCIARDIN, *Hist.* B. VI. Chap. IX. Fol. 229. of JEROME CHOMEDEY's old *French* Translation, p. 339. of the *Italian* Original. (Edit. Genev. 1645.) a Chicanery like this of CICERO's, used by *Gonsalvo* against the Duke of *Valentinois*. GROTIUS.

XI. (1) See APPIANUS ALEXANDRINUS, *De Bell. Illyr.* p. 761. Edit. H. Steph.

Of Faith given by private Men in War.

I. *That Faith given by private Men in War is not binding, confuted.*

I. That Saying of Cicero ¹ is well known, *Whatsoever any private Person, urged by Necessity, shall promise to the Enemy, even in that very Thing he must keep his Faith.* Private here implies, either Soldier or any other Person that does not bear Arms, for Faith is to be kept by all. It is surprizing then, that any Lawyers should maintain, That Faith in publick Agreements made with the Enemy is to be kept, but not in private; for if private Persons have particular Rights which they can engage, and an Enemy be capable of acquiring some Rights, what should hinder such an Obligation? Besides, unless this be allowed, there would be an Occasion given for Massacres, and a Bar to Liberty; for if private Faith were not held obligatory, the Lives of Prisoners oftentimes could not be saved, nor their Liberty procured.

II. *Faith given to Pirates and Robbers is binding, and how far.*

II. Further, not only to those who are Enemies by the Law of Nations, but even ¹ to Robbers and Pirates, we are to keep our private Faith, as we have said ^a above concerning publick Conventions made with such People; with this Difference, that if an unjust Fear, occasioned by the other, shall force a Promise from us, the Promiser ^b may demand Restitution, and upon Refusal may take it upon himself; which could not be done, if the Fear proceeded from a publick War according to the Law of Nations. But if that Promise were confirmed by an Oath, the Prom-

^a B. 3. ch. 19. § 2.

^b B. 2. ch. 2 § 7.

I. (1) *Atque etiam, si quid singuli, temporibus adducti, hosti promiserint, est in eo ipso fides conservanda.* De Offic. Lib. I. Cap. XIII.

II. (1) But see what we have said upon B. II. Chap. XI. § 7.

iser must indispensably perform his Word, unless he would be perjured. But if such ^c a Perjury be committed against a publick Enemy, it is commonly punished by Men; but if against Thieves, or Pirates, it remains unpunished in Detestation of those, with whom we had to do.

^c B. 3. *cb.* 19.
§ 5.

III. In this private Faith we are not to except Minors, if they are capable of understanding what they promise. ¹ For the Privileges allowed to Minors arise from the civil Law; whereas we now speak of the Law of Nations.

III. *A Minor here not excepted.*

IV. And we have already said ^a of Promises made by Mistake, that we have a Power to retract them, when that which through Error [[was]] believed, was according to the Intention of the Promiser, † the Condition of the Promise.

IV. *Whether an Error does excuse it.*

^a B. 2. *cb.* 11.
§ 6.

V. I. But how far the Power of private Men may extend in making any Contract, is a more difficult Question. It is certain, that no private Person can alienate what is publick; for if this be not allowed to Generals, as I have proved ^a a little above, much less ought it to be allowed to private Persons. But yet it is to be disputed, whether the Covenants made with their Enemies of their own private Concerns, whether Actions or Things, may stand; because we cannot grant those to the Enemy, without some Damage to our own Party. Whence it may seem, that all such Covenants are unlawful, whether they be made by Subjects, on the Account of the eminent Right of their State over them, or by listed Soldiers, in regard to their military Oath.

V. *An Objection made from publick Profit answered.*

^a B. 3. *cb.* 22.
§ 7.

2. But we must observe, that such Agreements, which prevent a greater or more certain Mischief, are to be esteemed ¹ rather beneficial than hurtful, even to the Publick; because a lesser Evil has comparatively the Appearance of Good: *Of Evils the less is to be chosen*, as one says in

III. (1) See above, § 5. of the Chapter referred to in the preceding Note.

† [[This is a mistranslation. The Latin reads *in mente agentis*, that is, “according to the belief of the person to whom the promise was made. . . .”]]

V. (1) As for Instance, when we promise to pay certain Contributions to prevent Pillage, burning of Places, &c.

² *Appian*. Yet neither can that bare Faith, whereby a Man does not absolutely renounce all Power over himself, and what he has, nor can the publick Benefit, without the Authority of a Law, have that Power, as to make an Engagement void and of no Effect, tho' we should grant that what was promised was against the Duty of the Promiser.

3. The Law indeed can take away this Power from Subjects, whether perpetual or temporary, but yet it does not always do so, for it spares Citizens. Neither can it always do it, for human Laws (as I have ^a [[sic: b]]) said already) have no Force to oblige, but when they are proportioned to human Infirmity, and not when they impose any Thing too burthensome, which is entirely repugnant to Reason and Nature. Therefore those Laws and particular Orders, which manifestly enjoin such Things, are not to be accounted Laws. And general Laws are to be taken in a favourable Sense, so as to exclude Cases of extreme Necessity.

4. But if that Act, which was prohibited by any Law, or particular Order, and declared void, might justly be so prohibited, then that Act of the private Person shall be made void, and he may also be punished, because he promised what was not in his Power, especially if being bound by Oath he did it.

^a [[sic: b]] B. 1.
ch. 4. § 7. n. 2,
3. and B. 2. ch.
14. § 12. n. 2.

VI. *These applied to our Faith given to return into Prison.*

VI. The Promise of a Captive to return unto Prison is justly tolerated, ¹ because it does not render his Condition worse than it was. Therefore that Action of *M. Regulus* was not only glorious (as some account it) but what was his Duty. ² *Regulus*, says *Cicero*, *Ought not by his Perjury to have violated the Conditions and Covenants of War*, notwithstanding what *Horace* says,

2. It is a *Carthaginian* who says this to induce his Countrymen to submit to the *Romans*, as they were not in a Condition to resist them. *De Bell. Punic.* p. 55. Edit. H. Steph.

VI. (1) Without which he would not be suffered to go Home: And it is undoubtedly better for him to have that Permission for a Time, than to continue always a Prisoner.

2. *Regulus vero non debuit conditiones pactionesque bellicas & hostiles perturbare perjurio*, *De Offic. Lib. III. Cap. XXIX.*

³ *Atqui sciebat, quae si barbarus
Tortor pararet* ———

*What Cords and Wheels, what Racks and Chains,
What lingring Tortures for his Pains
The barbarous Hangman made, he knew.* Creech.

For when he promised to return he knew what they might do. So of the ten <732> Captives, as *Gellius* relates it from old Writers, *Eight declared they had no Right of Postliminy, because* ⁴ *they were bound by Oath.*

VII. 1. Some Prisoners are released upon their Promise, not to return to such a Place, or not to bear Arms against the Releaser. We have an Example of the former in *Thucydides*, where those ¹ of *Ithome* promised the *Lacedemonians* to depart out of *Peloponnesus*, and never to return again: The latter is now common. There is an antient Example in *Polybius*, ² where the *Numidians* were dismissed by *Amilcar*, upon Condition, *That none of them should bear Arms against the Carthaginians.* *Procopius* ^a has the like Condition in his *Gothicks*.

VII. *Not to return to such a Place, or bear Arms against such a Party.*

^a *L. 2. c. 14.*
and *l. 3. c. 36.*

2. Some maintain this Agreement to be void, because it is contrary to the Duty which we owe to our Country: [[³]] But not every Thing that is against our Duty, is immediately void, as I said ^b before. Besides, it is not against our Duty, to procure our Liberty by promising to forbear a

^b *B. 2. ch. 5.*
§ 10. n. 3.

3. *Lib. III. Od. V. Ver. 49, 50.*

4. *Tum octo ex iis postliminium justum non esse sibi responderunt, quoniam dejurio victi forent.* Noct. Attic. *Lib. VII. (Cap. XVIII.) Dejurio victi*, that is to say, *capitis minores*, as *HORACE* expresses himself, (*ubi supra*) speaking of *Regulus*. *GROTIUS*.

This *De minutio capitis* was a Consequence of the Oath, by which the Prisoners were engaged to consider themselves always as in the Enemy's Power, and his Slaves: So that they had lost all the Rights of *Roman Citizens*.

VII. (1) Or rather the *Helotae*, and some others who had taken Refuge at *Ithome*, *Lib. I. Cap. CIII.*

2. The Historian does not speak of a Promise expressly given by the Prisoners not to bear Arms: He only says, that *Hamilcar* in releasing them, threatned to punish them severely and without Mercy, if they bore Arms against the *Carthaginians*, *Lib. I. Cap. LXXVIII.*

3. [[Footnote number missing in original text.]] For Instance, *ALBERICUS GENTILIS, De Jure Belli*, *Lib. II. Cap. XI.* Compare *PUFENDORF* with this Place, *Law of Nature and Nations*, *B. VIII. Chap. II. § 2.*

Thing, which it is in the Enemies Power to hinder. For whilst we are not released, we are as useless to our Country, as if we were really dead.

VIII. *Not to make an Escape.* VIII. Some also promise not to make their Escape; this also binds them, tho' they were in Fetters when they made it; tho' some are of another Opinion. For by this very Promise sometimes our Lives are saved, or we have more Liberty allowed. But if after this Promise, a Person be laid in Irons, he is therefore discharged of that Promise, if he made it upon that Condition, that he should not be bound.

IX. *A Captive taken by one, cannot yield himself to another.* IX. It is a foolish Query some make, whether a Person taken Prisoner by one, may yield himself to another. For it is very plain, that no Man can by Contract take away that Right, which another has acquired. For by the very Right of War, or partly by the Right of War, and partly by the Grant of him that makes the War, a Prisoner taken in War belongs to the Captor, as we have said ^a before.

^a B. 3. ch. 6. § 23, &c.

X. *Whether private Men may be compelled by their Sovereign, to perform what they have promised.* X. There is a remarkable Question concerning the Effects of such Agreements, namely, whether private Men upon their neglecting to perform what they have promised, may be compelled to it by their Sovereign. And that they may, is the best grounded Opinion, but only in a solemn War, and that by the Right of Nations, which binds those that make War, to do what is right and just to each other, even concerning the Facts of ¹ private Men; as if an Ambassador sent from the Enemy should be insulted by a private Person. Thus *A. Gellius* quotes out of *Cornelius Nepos*, ² *That many in the Senate agreed, that those of the ten Prisoners,*

X. (1) It would be to no Purpose, that they stood engaged by Promise, if there were Nobody, who could compel them to perform it. This ALBERICUS GENTILIS says in the Chapter cited in the foregoing Note towards the End. Let us add, that this Kind of Promises either have been, or ought to be tacitly approved by the Sovereign: So that he ought to see them made good to the utmost of his Power.

2. *Cornelius autem Nepos, &c. Noct. Attic. Lib. VII. Cap. XVIII.* Before this Time the same Roman Senate had compelled some Prisoners to return to *Pyrrhus*, who had dismissed them upon that Condition. APPIAN, *Excerpt. Legat.* Num. 6. [p. 348. *Eclog. Fulv. Ursin.*] GROTIUS.

who being obliged by Oath to return, refused, should by a strong Guard be delivered up to Hannibal.

XI. We must observe those Rules which we have several Times mentioned, ^a concerning the Interpretation of Words in such Agreements, that is, we ought not to recede from the proper Signification of the Words, unless to avoid an Absurdity, or when there is any other Conjecture, sufficiently certain, of the Intention of the Promiser; so that where the Words are dubious, we are to incline rather to that Sense that is against him who gives the Conditions.

XI. *What Interpretation to be allowed in such Covenants.*

^a *B. 2. ch. 16. § 2. and B. 3. ch. 20. § 26.*

XII. He that agrees for his Life, has not therefore a Right to his Liberty; under the Name of Apparel, Arms are not comprehended, for they are distinct Things. <733> Aids are said then to come when they are in fight, tho' they do nothing; for the bare Presence has its Effect.

XII. *How we must take these Words, Life, Apparel, the coming of Aids.*

XIII. But he cannot be said to return to the Enemy, who returning privately, departs again immediately; for our Promise to return is to be so understood, that we shall be again in the Power of our Enemy; to take Advantage of an Explication quite contrary, is according to *Cicero* ¹ a notorious Cheat, a foolish Cunning, which adds Perjury to Chicanry. ² *Gellius* calls it a fraudulent Trick, branded by the Censors with Infamy, and says the Practicers of it were rendered odious and execrable.

XIII. *Who may be said to return to the Enemy.*

XIV. ¹ In Agreements made not to surrender, if just Succours should come, we must by them understand, such as are sufficient to free us from the Danger we were in.

XIV. *Succours, when said to be sufficient.*

XIII (1) *Reditu enim in castra, &c.* De Offic. Lib. III. Cap. XXXII.

2. *Haec eorum fraudulenta, &c.* Noct. Attic. VII. 18.

XIV. (1) There is in PROCOPIUS four Examples of this Sort of Convention. *Gotthic.* Lib. III. (Cap. VII. XII. XXX. XXXVII.) And one, in AGATHIAS, concerning the City of *Lucca*, Lib. I. (Cap. VII.) Another in BIZARO, concerning a Castle in the Island of *Corsica*, Hist. Genuens. Lib. X. See others of the same Kind, *B. XVIII.* and in the War against the *Moors*, CROMER has also one, *Lib. XI.* GROTIUS.

- XV. *The manner of Execution makes no Condition.* XV. This also is to be observed, if any Thing be agreed on concerning the Manner of Execution, that alone does not render the Agreement conditional: As if it be stipulated that we should pay in a certain Place, and that Place happen afterwards to change its Master.
- XVI. *Of Hostages to perform such Covenants.* XVI. We must judge of Hostages as ^a above said; for the most Part they are but a bare Accessary of the principal Engagement; but yet it may be so covenanted, that the Obligation may be alternatively understood, that is, that such a Thing shall be done, or the Hostages may be detained. But in a dubious Case, we must incline to that which is most natural, that is, that they shall be reputed as an Accessary only of the Agreement.
- ^a *B. 3. ch. 20. § 28.*

Of Faith tacitly given.

I. That some Things ¹ [[are]] † agreed only by Silence, was not ill observed by *Javolenus*, which takes Place, in publick, private, and ² mixt Agreements. The Reason is this, because it is the Consent, howsoever signified and accepted, that has the Power of transferring Right. But this Consent may be declared otherwise than by Words and Letters, as we have more than once shewed ^a already. And some Signs are included in the Nature of certain Acts.

I. *How Faith may be given by Silence.*

^a *B. 2. ch. 4. § 4, 5. and B. 3. ch. 1. § 8.*

II. As for Example. He that coming from an Enemy, or a strange Country, commits himself to the Faith of another King, or People; does without doubt tacitly oblige himself to do nothing against that State, whose Protection he desires; <734> wherefore we are not to join with them ¹

II. *An Example in one desiring to be received into Protection by any Prince or People.*

I. (1) *Videtur autem in hac specie id silentio convenisse, ne quid praestaretur, si ampliore pecunia fundus esset locatus. Digest, Lib. XIX. Tit. II. Locati conducti, Leg. LI. princip.* See Mr. NOODT's Treatise, *De Pactis, Cap. II.*

† [[The word "are" is missing in the original, but in some copies has been written in.]]

2. Our Author understands by *mixt Conventions* what he calls *Sponsio*, that is to say Conventions made by publick Persons and upon publick Affairs; but without any express or tacit Order of the Sovereign: For in that Respect they have something of private Agreements in them, those, who make them, having at the same Time they are made, no more Power than mere private Persons.

II. (1) ALBERICUS GENTILIS, (*De Jure Bell. Lib. II. Cap. IX. init.*) ascribes this to VALERIUS MAXIMUS, from whom he cites some Words, to which our Author seems to allude in this Place after him. But that Historian says nothing at all of *Zopyrus*; he speaks of Stratagems in general: *Illa vero pars calliditatis egregia, & ab omni reprehensione procul remota, cujus opera, quia adpellatione nostra vix aptè exprimi possunt,*

that justify the Act of ² *Zopyrus*; for his Loyalty to his King could not justify his Treachery to those unto whom he had fled. The same may be said of *Sextus* ³ the Son of *Tarquin*, who retired to *Gabii*. *Virgil* upon *Sinon*, says,

⁴ *Accipe nunc Danaum insidias, & crimine ab uno
Disce Omnes* ———

*Now hear how well the Greeks their Wiles disguis'd;
Behold a Nation in a Man compris'd.* Dryden.

III. *He that
desires or
admits a
Parley.*

III. So he that demands, or admits of a Parley, silently promises, ¹ that during the Parley both Parties shall be secure. *Livy* ² calls it a Breach of the Law of Nations, to hurt an Enemy under the Pretence of an Interview. He terms it, ³ *An Interview perfidiously violated*. *Val. Maximus* ⁴ passes this Censure on *Cn. Domitius*, who had invited *Bituitus* King of *Auvergne* to a Conference, and had entertained him as his Guest, and then treacherously bound him, *His insatiable Ambition of Glory made him be perfidious*. Wherefore I admire, why he that wrote the 8th Book

Graeca pronunciatione STRATEGEMATA dicuntur. Lib. VII. Cap. IV. *princ.* It is true, he puts in the Number of these innocent Stratagems a like Action of *Sextus Tarquinius*. For the rest, see PUFENDORF, on this Case, *Law of Nature and Nations*, B. VIII. Chap. XI. § 5.

2. See it related by HERODOTUS, *Lib. III. Cap. CLIV. & seqq.* JUSTIN, *Lib. I. Cap. ult. &c.*

3. This is in LIVY, *Lib. I. Cap. LIII. and LIV.*

4. *Aeneid*. Lib. I. Ver. I. 65, 66.

III. (i) It is therefore with Reason, that AGATHIAS blames *Ragnaris*, General of the *Huns*, for having treacherously attempted to kill *Narses*, as the latter returned from a Conference demanded by the former. *Lib. II. (Cap. VII.) GROTIUS.*

2. *Deinde, quod ipsi Consuli, parum cauto adversus colloquii fraudem, insidiabantur—& successisset fraudi, ni pro jure Gentium, cujus violandi consilium ininitum erat, stetit fortuna*, Lib. XXXVIII. Cap. XXV. Num. 7, 8.

3. *Major multo pars perfide*, [it must be read so instead of *perfidem*] *violati colloquii poenas morte luerunt*. Ubi supr. (*in fin. Cap.*) GROTIUS.

This Correction of our Author's is entirely unnecessary, as appears from many Examples of the same Kind cited here by GRONOVIVS. See also CAESAR, *De Bell. Gall.* Lib. I. Cap. XLVI. and the Note of Mr. DAVIES. The Sense is the same at Bottom.

4. *Cn. autem Domitium, &c. Lib. IX. Cap. VI. Num. 3.*

of *Caesar's Gallick Wars*, whether *Hirtius*, or *Oppius*, relating the like Act of *T. Labienus*, adds these Words, ⁵ *He supposed, that Comius's Infidelity might be prevented without any Imputation of Treachery to himself.* Unless this be rather the Judgment of *Labienus*, than of the Writer.

IV. But we must not extend this tacit Consent beyond what I have said; for if those with whom we have an Interview receive no Hurt, it is no Breach of Faith to make use of that Conference to divert the Enemy from his military Projects, and in the mean while to advance our own Affairs. It is one of the innocent Artifices of War. Wherefore they who blamed the deluding of King *Perseus*, ¹ with the Hopes of Peace, had not so much regard to Justice and Fidelity, as to a generous Mind, and martial Glory, as may be sufficiently gathered from what has been ^a already said of warlike Stratagems. Of this Kind was that Policy, by which ² *Asdrubal* saved his Army out of the *Ausetan* Defiles; and by which *Scipio Africanus* the elder discovered ³ the Situation of *Syphax's* Camp, both recorded by *Livy*. Whose Example *L. Sylla* followed in the Social War at *Esernia*, as *Frontinus* ⁴ tells us.

IV. *It is lawful for either Party to promote his own Interest, so that he does not hurt the other.*

^a *B. 3. ch. 1. § 6, &c.*

5. *Quum Comium comperisset, &c.* Cap. XXIII. Mr. COCCEIUS, during his Life, celebrated Professor of Law at *Frankfort upon the Oder*, criticises our Author (in a Dissertation *De Officio & Jure Mediatorum Pacis*, § 24.) as if *he doubted*, whether there was any Perfidy in this Action of *Labienus*. I confess, for my Part, I cannot see the least Foundation for that Censure, and do not believe, that any Body, who will read the Passage with never so little Attention, can find any. It was the Fate of our Author to be ill understood by those who take the most Liberty in reproving him.

IV. (1) *Decepto per inducias & spem pacis Rege, &c.* LIVY, *Lib. XLII. Cap. XLVII. Num. 1.*

2. He demanded a Conference for the next Day, but decamped without Noise at the beginning of the Night. See LIVY, *Lib. XXVI. Cap. XVII.*

3. *Scipio* sent Soldiers disguised like Slaves with his Officers, who during the Time the latter conferred with *Syphax*, dispersed themselves throughout the Camp, and examined every Thing. See the same Historian, *Lib. XXX. Cap. IV.*

4. *Strategem.* *Lib. I. Cap. V. (Num. 17.)* and by *Julius Caesar*, during his Dictatorship, when he made War against the *Tencteri* and *Usipetes*. APPIAN. *Excerpt. Legat.* Num. 16. GROTIUS.

V. *Of some dumb Signs, to which Use has given a Signification.*

V. There are also some dumb Signs, ¹ significant through Custom; as of old <735> Hair-laces, and Branches of Olives; and among the *Macedonians*, ² the Erection of Pikes; among the *Romans*, ³ their covering their Heads with their Shields, were Signs of a submissive Surrender, and consequently obliged to the laying down of Arms. But whether he that signifies his accepting of a Surrender, be obliged, and how far, may be easily learnt from what has been said ^a already. ⁴ Among us the hanging out a white Flag is a tacit Sign of demanding a Parley, and shall be as obligatory, as if expressed by Words.

^a B. 3. ch. 4.
§ 12. and ch. 2.
§ 15.

VI. *Of a silent Approbation of a Treaty.*

VI. We have already ^a declared how far an Agreement made by a General without the Order of the State, may be believed to be tacitly approved by the Prince or People; as when the Act is fully known, and thereupon some Thing done, or not done, of which no other Reason can be given, but their Consent to their Agreement.

^a B. 2. ch. 15
§ 17. and B. 3.
ch. 22. § 3.

V. (t) Amongst the *Persians* [or rather amongst the *Assyrians*] the Hands joined together behind the Back was a Sign of Submission, as AMMIANUS MARCELLINUS relates, *Lib. XVIII. (Cap. VIII.)* upon which See LENDENBROG's Notes, (*p. 222. Edit. Vales. Gron.*) Amongst the *Romans* they had also this Sign, to put the Shield under the Arm-pit, and throw down the Standards, as appears in the same Historian, *Lib. XXVI. Cap. IX. p. 512.* (upon which the Reader may consult the Note of Mr. VALOIS) the Standards were also bowed down. LATINUS PACATUS mentions such a Sign in his *Panegyrick*, (*Cap. XXXVI. Edit. Cellar.*) The antient *Germans*, and others in Imitation of them, presented Grass to the Conqueror. See PLINY, *Hist. Natur. Lib. XXII. Cap. IV.* SERVIUS observes, that those who surrender themselves, lay down their Arms, to appear in the Posture of Suppliants: [MANUS INERMES]—*Aut supplices—qui enim victi se dedunt, INERMES Supplicant.* In *Aeneid. Lib. I. (Ver. 478.)* GROTIUS.

2. This LIVY confirms: *Quia erigentes Hastas Macedonas conspexerat—ut accepit hunc morem esse Macedonum tradentium sese, &c.* *Lib. XXXIII. Cap. X. Num. 3, 4.* The learned GRONOVIVS refers to this Passage.

3. APPIANUS ALEXANDRINUS, to whom our Author refers here in a little Note, and VALOIS has cited upon AMMIANUS MARCELLINUS, relates this, speaking of the Troops of *Africanus*, *De Bell. Civil. Lib. II. p. 454. Edit. H. Steph.*

4. The People of the *North* kindle a Fire to signify that Demand, as appears from the History of JOHANNES MAGNUS, and other Authors. PLINY observes, that in his Time, it was customary to present a Laurel, to signify a Desire that Hostilities might be discontinued: *Ipsa [Laurus] pacifera, ut quam praetendi, etiam inter armatos hostes, quietis sit indicium.* *Hist. Natur. Lib. XV. Cap. XXX. GROTIUS.*

VII. ¹ A Punishment cannot be supposed to be remitted from its being for a Time neglected; but some positive Act must necessarily intervene, which may either by itself argue a good Will, as a Treaty of Friendship; or at least so great an Opinion of the Virtue of the Person to be punished, that his former Actions may merit a Pardon, whether this Opinion be expressed by Words, or by such Actions as are usually taken to signify as much.

VII. *When a Punishment is tacitly remitted.*

VII. (1) POLYBIUS handles this Question, whether when we pardon the Person who actually commits the Crime, we are not supposed by that alone to pardon him also by whose Order it was committed. *Excerpt. Legat. Num. 122.* For my Part, I think not. For every Man is answerable for his own Faults. GROTIUS.

The Citation from POLYBIUS was faulty (to make a transient Observation) as well as an Infinity of others in all the Editions before mine. For it was marked *Num. 22.* where there is nothing like it. The Fact in the true Passage, as I have corrected, is this. A Roman Ambassador had been killed by *Leptines*. The latter was delivered up to the Romans by King *Demetrius*, whose Subject he was. But he was sent back, with another of his Accomplices: And the Historian, who relates it, believes, that the Reason why the Senate acted in this Manner, was, because they were for reserving to themselves the Liberty of punishing on a proper Occasion such an Attempt upon their Ambassador, for which Satisfaction might be supposed to be taken, had they punished the Authors of the Murder, *p. 1324. Edit. Amstel.* But it does not appear by the Narration, that *Demetrius* had any Share in the Crime, and much less that he had commanded it. And as for the Question in itself, the Decision of our Author does not always take Place in my Opinion. For if he, who has commanded, or otherwise occasioned a Crime to be committed, gives up the Author of it, expressing thereby his Desire to obtain Pardon for himself; the Party, against whom the Crime hath been committed, ought to be deemed to grant the Pardon, whether he punishes the Criminal delivered up or no; unless in punishing him, or sending him back, he declares in a proper Manner, that he does so without Prejudice to the Right he reserves to himself against him who was the first Cause or Accomplice in the Crime. Otherwise, there is a tacit Consent to Pardon implied, which answers to the formal Demand of it, and which may be presumed with as much Reason as in the other Examples alledged by our Author.

*The Conclusion, with Admonitions to
preserve Faith and seek Peace.*

I. *Admonition
to Princes to
keep their
Faith.*

I. 1. And here I hope I may make an End; not that I have said all that might have been said, but that which hath been said may be enough to lay a Foundation, on which if any other will build a more stately Fabrick, I shall be so far from <736> envying him, that I shall heartily thank him. Yet before I dismiss my Reader, as before, when I treated of the Design of undertaking War, I brought some Arguments to persuade all Men, to the utmost of their Power, to prevent it. So now I shall add some few Admonitions that may be of Use, both in War and after War. These Admonitions regard the Care of preserving Faith and seeking Peace. We ought to preserve our Faith for several Reasons, and amongst others, because without that we should have no Hopes of Peace. ¹ *For by Faith, (says Cicero) not only every State is preserved, but that grand Society of all Nations is maintained. If this be taken away,* says ² *Aristotle* rightly, *All human Correspondence ceases.*

2. Therefore the same *Cicero* ³ calls it detestable to break Faith, the Observation of which is the Bond of human Life, and, as *Seneca* ⁴ says, *Faith is the most sacred Good of the rational Soul.* Which Sovereign

I. (1) *Nec enim ulla res vehementiùs rempublicam continet, quam fides.* De Offic. Lib. II. (Cap. XXIV.)

2. *Rhetor.* Lib. I. Cap. XV. p. 545. B. Vol. II. *Edit. Paris.*

3. *Aeque enim perfidiosum & nefarium est, fidem frangere, quae continet vitam, &c.* [Orat. pro Q. Rosc. Comoed. Cap. VI.]

4. *Fides sanctissimum humani pectoris bonum est, &c.* Epist. LXXXVIII. p. 390. *Edit. Gron. Maj.*

Princes ought the more solemnly to keep, by how much they offend with more Impunity than others. Wherefore take away Faith, ⁵ they will be like wild Beasts, whose Rage all Men dread. Justice indeed in other Parts, has often something that is obscure, but the Bond of Faith is self-evident, and to that End do Men engage their Faith in their Dealings, that all Doubts may be removed.

3. How much more then does it concern Princes religiously to observe their Faith, first for the sake of their Conscience, then for that of their Reputation, on which depends the Authority of their Government. Let them not then doubt, but that they who endeavour to instill into them the Art of Deceiving, practise the same they teach. Their Practices cannot possibly prosper long, which render Men unsociable to Men, and hateful to GOD.

II. Further, it is impossible that we should have a quiet Conscience, and a just Confidence in the Protection of Heaven, unless we aim at Peace in every Thing we do throughout the whole Course of a War. For it was very truly said of *Salust*, ¹ *That wise Men, for the sake of Peace, make War.* To which agrees the Opinion of St. *Augustine*, ² *We seek not Peace, to*

II. *The Design of War to settle a firm Peace.*

5. The Emperor *Justinian*'s Embassadors said to *Cosroez*, King of *Persia*, according to *PROCOPIUS*: "If we did not speak to yourself, O King, we should never have believed, that *Cosroez*, the Son of *Cabades*, could have entered the *Roman* Territories in Arms, without regard to the Oath he had lately taken, that is to say, what is deemed amongst Men the most certain and most sacred Pledge of Promise given; and in Breach besides of Treaties, which are the sole Resource of those, who, from their bad Success in War, are not secure for the future. Is not this changing human Life into that of wild Beasts? For if Confidence be no longer to be reposed in Treaties, Wars must necessarily be eternal; and War without End, makes Men renounce all Sentiments of Humanity." *Persic*. Lib. II. (Cap. X.) *GROTIUS*.

II. (1) *Postremo sapientes, pacis causâ, bellum gerunt, laborem spe otii sustentant.* Orat. I. *Ad Caesar*. De Rep. ordinand. Cap. XL.

2. *Non enim pax quaeritur, ut bellum excitetur: sed bellum geritur, ut pax adquiratur.* Epist. *Ad Bonifac*. CCVII. This Passage with many other Thoughts, which follow and precede it, is repeated in the *Canon Law*, Caus. XXIII. Quaest. I. Can. III. I find something like it in *PLATO*. That famous Pagan Philosopher says, that a good Legislator ought so to conduct the Affairs of War that all Things may tend to Peace, rather than direct the Affairs of Peace by the Views of War. *De Legibus*, Lib. I. p. 628. E. Vol. II. *Edit. H. Steph.* Long Time after a Platonick Philosopher, who lived

make War; but we make War, in order to establish Peace. Aristotle himself often condemns those Nations that make War their chief End. Violence is in itself brutish, which is yet most eminent in War; wherefore it ought to be the more carefully tempered with Clemency and Humanity, lest by too much imitating Beasts, we absolutely forget the Man.

III. *Peace to be embraced, tho' with Loss, especially among Christians.*

III. A safe and honourable Peace then is not too dearly bought, at the Expence of forgiving Offenders, Damages, and Charges, especially among Christians; to whom our LORD bequeathed Peace, as his last Legacy, whose best Expositor St. *Paul, Rom. xii. 18. Would have us live peaceably with all Men, as far as in us lies.* A good Man unwillingly enters into a War, nor is willing to push it to the utmost, as *Salust*¹ tells us.
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IV. *Peace is profitable to the Conquered.*

IV. This Reason alone might indeed be sufficient; but very often our own Interest requires it. First, when we are weaker than our Enemy, because it is dangerous to contend long with one more mighty; and here,

under the first *Roman* Emperors, inculcated strongly the same Maxim, by declaring in the Preface to a Work, intended to establish the Principles of the military Art, that this Book ought to be regarded as an offering to Peace, *p. 2.* See the NOTE of NICHOLAS RIGAULT upon it.

III. (1) *Viri boni est, initia belli invitum suscipere, extrema non libenter persequi.* In this Manner our Author expresses the Passage, which he ascribes to SALLUST, (*apud Sallustium legimus*, says he) but without marking the Place, or putting the Words in *Italick* Characters. I can find no such Passage in the two perfect Works of that Historian, nor in his Fragments: Neither does Mr. WASSE's *Index*, which is very ample, and sufficiently exact, give any Light concerning it; tho' there are Expressions in this Passage, which he undoubtedly would not have failed to observe. I almost believe, that our Author, deceived by his Memory, or otherwise, has cited this Author for some other. What might have given Occasion for it, is a fine Passage in the History of the War against *Jugurtha*, where there is something that relates to this Place, which the Reader will not be offended at my repeating. It says, that War is easily entered into, but as hard to be got out of again; that the beginning and end are not in the same Person's Power: That any Coward may begin it, but to conclude it, depends upon the Victor's Pleasure: *Omne bellum sumi facillè, ceterum agerrume desinere: non in ejusdem potestate initium ejus & finem esse: incipere, cuivis etiam ignavo licere; deponi, quum victores velint.* Cap. LXXXV. *Edit. Wass.*

as at Sea, we must by some Loss redeem a greater Mischief, without listening to revenge or hope, bad Counsellors, as *Livy* ¹ rightly calls them; which ² *Aristotle* thus expresses, *It is much better to part with some of our Substance to those that are stronger, than being overcome to perish with all we have.*

V. Yea, and to the stronger Party Peace turns to account; because as the same *Livy* most truly says, ¹ Peace is glorious and advantageous, when we give it in our Prosperity; it is better and safer, than a hoped-for Victory. For we must consider, that the Success of War ² is uncertain. *Aristotle* says, ³ *We must remember how many and unforeseen Changes happen in War.* *Diodorus* ⁴ in an Oration for Peace blames those, *Who boast of their great Exploits done in War, as if it were not usual for Fortune to favour*

V. *And to the Conqueror.*

IV. (1) It is in the seventh Book in an Harangue, wherein *Titus Quintius*, constituted General against his Will by the seditious Soldiers, exhorts them to Peace and Submission: *Pacem, etiam qui vincere possunt, volunt, quid nos velle oportet? Quin omissis irâ & spe fallacibus auctoribus nos ipsos nostraque omnia cognitae permittimus fidei.* Cap. XL. *in fin.*

2. The Passages cited here, and in the following Paragraph, by our Author, without saying from what Work they are taken, are both in the Rhetorick addressed to *Alexander*. Cap. III. p. 616. C. Vol. II. *Edit. Paris.*

V. (1) It is in the Speech of *Hannibal* to *Scipio*: *In bonis tuis rebus, nostris dubiis, tibi ampla ac speciosa danti est pax—Melior tutiorque est certa pax, quam sperata victoria.* Lib. XXX. Cap. XXX. Num. 18, 19.

2. *Quum tuas vires, tum vim fortunae, Martemque belli communem, propone animo.* *LIVY, ubi supr.* Num. 20.

3. *Rhetoric. ad Alexand.* Cap. III. p. 616. *PHILO* maintains, that Peace, tho' very disadvantageous, is always better than War. *De Constit. Princip.* (p. 733. D. *Edit. Paris.*)

4. In the Oration recited by *DIODORUS SICULUS*, from which our Author says he took this, without specifying the Place, or even the Book, it is not the Speaker that blames a presumptuous Confidence, founded upon good Success: On the contrary, the Speaker, that is to say an Athenian Demagogue, named *Cleophon*, exhorting the People, not to Peace but War, amongst other Reasons employs that, which he knew was very proper to animate the Multitude. The opposite Reflection is the Historian's own, who did not think fit to relate more of it than this Passage. *Bibl. Histor.* Lib. XIII. Cap. LIII. p. 356. *Edit. H. Steph.*

sometimes one Side, sometimes another. And ⁵ the bold Attempts of de-
<738>perate Men are as much to be feared, as the most violent Bitings
of ⁶ dying Beasts.

5. There is an antient *Greek Verse* that says, the Den of a Lion even dying is dangerous:

Δεινὰ γὰρ καὶ κοῖται ἀποικομένοιο λέοντος.

GROTIUS.

Mr. BARBEYRAC in his *Additions and Corrections* says: After this Note was printed I found the *Greek Verse* by Accident in PLUTARCH, towards the End of the Life of *Marius*, p. 432. C. Edit. Wech. Where there are two Words differently placed from the Manner in which our Author here repeats them.

Δεινὰ γὰρ κοῖται καὶ ἀποικομένοιο λέοντος.

Besides the Word *ἀποικομένοιο* is translated *absent*, and not *dying* by the *Latin* Interpreter, and two *French* Translators; which at first seems to agree very well with the Sequel of the Discourse. So that GROTIUS's Application would not be just, or else we must say, that citing by Memory, he had forgot the Sense of the equivocal Word *ἀποικομένοιο* in the Place from which he took it. However when I examine well the Circumstances of *Marius's* Condition, who is said to have heard some Voice perpetually resounding this Verse in his Ears; our Author seems to have had good Reasons for explaining *ἀποικομένοιο* by *even dying*: Which we should find if we had the antient Poet, from whom this Verse had probably passed into a Proverb. In the Terror and extraordinary Agitation of Mind, in which *Marius* was, he did not consider *Sylla* as absent, to whom the *ἀποικομένοιο* ought to be applied, according to the Sense commonly given to that Word: On the contrary, he represented that young and vigorous Army, as present, and at the Gates of *Rome*, from the News he received of his approach. I therefore imagine, that he applied the *Greek Verse* to himself, and that he took it at the same Time as a Presage of his approaching Death, and an Exhortation to perish like an old Lion, as he was. The Word *ἀποικόμενος* is often applied to those who die, especially in the Poets: And I find an Example very like this in an antient Oracle repeated by LUCIAN, in which a Wolf is spoken of:

Μιμείσθαι χρὴ πότμον ἀποικομένοιο Λύκοιο.

De Mort. Peregrin. Vol. II. p. 579. Edit. Amstel. Mr. DACIER makes the chief Point of the Application of the *Greek Verse* consist in *Rome's* being the Country of *Sylla*. But that Circumstance did not make it more terrible to *Marius*, than before: It was the present Situation of Affairs, and especially the Augmentation of *Sylla's* Power, from the Victories he had lately acquired, which terrified *Marius*, and would have frightened him any where else. So that this Observation of the new Translator is no better than many others of his, for Instance, that which he makes a little lower, (*Vol. IV. p. 188.* Edit. Amstel.) upon PLATO's thanking his good Genius, for having occasioned his being born a *Man and not a Beast*. If ever Commentator endeavoured to find, *Nodum in scirpo*, it was certainly in this Place.

6. GRONOVIVS properly refers us here to this Passage of FLORUS: *Sed ut quammaximè mortiferi esse morsus solent morientium bestiarum: sic plus negotii fuit, semirutà*

VI. But if both Parties think they are of equal Strength then (in the Opinion of ¹ *Caesar*) it is the fittest Time to treat of Peace, whilst each Party has a good Opinion of his own Strength.

VI. *And to those whose Affairs are doubtful.*

VII. But Peace being made, whatever the Conditions be, they ought to be punctually observed, on account of † the Faith given, the Obligation of which I have proved to be sacred and indispensable. And we ought to be very careful to avoid not only Perfidiousness, but whatsoever may exasperate the Mind. For what ¹ *Cicero* said of private Friendship, may be fitly applied to publick. That all the Duties of Friendship are to be observed religiously at all Times, but especially when it has been renewed by a Reconciliation.

VII. *Peace once made to be religiously kept.*

VIII. May the *ALMIGHTY* then (who alone can do it) impress these Maxims on the Hearts of Christian Powers; may he enlighten their Minds with the Knowledge of every *Right*, ¹ Divine and Human, and inspire them with the constant and dutiful *Sense* of their being the *Ministers of Heaven*, ordained to govern *Men*; *Men*, for whom, of all his Creatures, ² *GOD* has the greatest *Regard* and *Affection*.

VIII. *The Author's Wish, and the Conclusion.*

END of the third and last BOOK.

Carthagine, quam integrâ. Lib. II. Cap. XV. Num. 13. And FREINSHEMIUS cites one from SENECA upon it, *Excerpt. Controv.* Lib. IX. Controv. VI.

VI. (1) *Hoc unum esse tempus de pace agenda, dum sibi uterque confideret, & pares ambo viderentur.* De Bell. Civil. Lib. III. Cap. X.

† [[In the original text at this point there is a footnote number that is not keyed to any footnote and is apparently a misprint.]]

VII. (1) It is in a Fragment of his Oration for *Gabinus*: *Ego, quum omnes amicitias tuendas semper putavi summâ religione & fide, tum eas maximè, quae essent ex inimicitis revocatae in gratiam.* Apud HIERONYM. *Apolog. adv. Ruffin.* Lib. I. *init.* p. 196. D. Vol. II. *Edit. Basil.* 1537.

VIII. (1) Our Author, as the learned GRONOVIVS remarks here, uses the express Terms of the Prayer of *Tiberius* to the Gods, according to TACITUS: *Hos [Deos precor] ut mihi, ad finem usque vitae, quietam & intelligentem humani divinique juris mentem duint, &c.* Annal. Lib. IV. Cap. XXXVIII. Num. 4.

2. So St. CHRYSOSTOM says, *Serm.* De Eleemosyna. GROTIUS.

The famous SOCRATES often spoke of the Love, which the Gods had for Mankind, *φιλανθρωπία*, as appears from the Memoirs, which XENOPHON has left us of his Dis-

courses and Actions. See for Instance, *Lib. IV. Cap. III.* Edit. Oxon. SIMPLICIUS, in his Commentary upon EPICURETUS, says, that Man is a Possession of GOD, neither vile nor contemptible; and uses that Reason to prove, that GOD cannot neglect to take Care of him, as of his Creature. In *Cap. XXXVIII. p. 239. Edit. Ludg. Batav.* That Philosopher Reasons upon a Principle, which PLATO had long before laid down, which is, that Man is a Kind of Possession peculiar to GOD, whom consequently he loves. In *Phaedone*, Vol. I. p. 62. B. *Edit. Hen. Steph.* I cannot conclude my Notes better than with these fine Passages, which are the more remarkable, as they are taken from Heathen Authors, whose Authority in this Point is of more Weight, than that of a Father of the Church.

PASSAGES OF SCRIPTURE,
 Illustrated, examined,
 or corrected in this TREATISE. †

- Gen. iv. 14. *Behold thou hast driven me out this Day, from the Face of the Earth; and from thy Face shall I be hid, and I shall be a Fugitive and a Vagabond in the Earth, and it shall come to pass, that every one that findeth me shall slay me.*
 Page 29.
- iv. 24. *If Cain shall be avenged sevenfold, truly Lamech seventy and sevenfold.* ibid.
- ix. 5. *And surely your Blood of your Lives will I require; at the Hand of every Beast will I require it; and at the Hand of Man, at the Hand of every Man's Brother will I require the Life of Man.* 28.
- ix. 6. *Whoso Sheddeth Man's Blood, by Man shall his Blood be shed; for in the Image of GOD made he Man.*
ibid.
- xiv. 16, 17. *And he brought back all the Goods, and also brought again his Brother Lot, and his Goods, and the Women also, and the People. And the King of Sodom went out to meet him (after his Return from the Slaughter of Chedorlaomer, and of the Kings that were with him) at the Valley of Shaveh, which is the King's Dale.* 678.
- xiv. 20. *And blessed be the Most High GOD, which hath delivered thine Enemies into thy Hand; and he gave him Tithes of all.* 26, 579.

† The page numbers listed here are from the 1738 edition.

- xviii. 23. *And Abraham drew near, and said, Wilt thou also destroy the Righteous with the Wicked?* 518.
- xx. 12. *And yet indeed she is my Sister; she is the Daughter of my Father, but not the Daughter of my Mother; and she became my Wife.* 524.
- xxv. 6. *But unto the Sons of the Concubines which Abraham had, Abraham gave Gifts, and sent them away from Isaac his Son (while he yet lived) Eastward, unto the East-Country.* 228.
- xxxviii. 24. *And it came to pass about three Months after, that it was told Judah, Saying, Tamar thy Daughter-in-Law hath played the Harlot; and also behold she is with Child by Whoredom: And Judah said, Bring her forth, and let her be burnt.* 30.
- Exod. xvii. 14. *And the LORD said unto Moses, Write this for a Memorial in a Book, and rehearse it in the Ears of Joshua, for I will utterly put out the Remembrance of Amalek from under Heaven.* 27.
- xx. 2, 3, 4, &c. *I am the LORD thy GOD, which have brought Thee out of the Land of Aegypt, out of the House of Bondage. Thou shalt have no other Gods before me. Thou shalt not make unto thee any graven Image, &c.* 442.
- xxi. 14. *But if a Man come presumptuously upon his Neighbour, to slay him with Guile; thou shalt take him from mine Altar, that he may die.* 461.
- xxii. 2. *If a Thief be found breaking up, and be smitten that he die, there shall be no Blood shed for him. But if the Sun be risen upon him, there shall be Blood shed for him.* 54, 138.
- xxii. 28. *Thou shalt not revile the Gods, nor curse the Ruler of thy People.* 113.
- Lev. xviii. 24, 26, 27. *Defile not you yourselves in any of these Things: For in all these the Nations are defiled which I cast out before you. And the Land is defiled; therefore I visit the Iniquity thereof upon it, and the Land itself vomiteth out her Inhabitants. (For all these Abominations have the Men of*

- the Land done, which were before you, and the Land is defiled.)* Page 197.
- Num. xiv. 30. *Doubtless ye shall not come into the Land, concerning which I swear to make you dwell therein, save Caleb the Son of Jephunneh, and Joshua the Son of Nun.* 316.
- Deut. xix. 19. *Then shall ye do unto him, as he had thought to have done unto his Brother.* 432.
- xx. 10. *When thou comest nigh unto a City, to fight against it, then proclaim Peace unto it.* 554.
- xx. 15. *Thus shalt thou do unto all the Cities which are very far off from Thee, which are not of the Cities of these Nations.* 27.
- xx. 19. *When thou shalt besiege a City a long Time, in making War against it to take it, thou shalt not destroy the Trees thereof.* 651.
- xxiii. 6. *Thou shalt not seek their Peace, nor their Prosperity, all thy Days for ever.* 343.
- Josh. ix. 15. *And Joshua made Peace with them, and made a League with them, to let them live: And the Princes of the Congregation swear unto them.* 317.
- Judg. iii. 15. *But when the Children of Israel cried unto the LORD, the LORD raised them up a Deliverer, Ehud the Son of Gera, a Benjamite, a Man left-handed: And by him the Children of Israel sent a Present unto Eglon the King of Moab.* 124.
- 1 Sam. xxv. 33. *And blessed be thy Advice, and blessed be thou, which hast kept me this Day from coming to shed Blood, and from avenging myself with my own Hand.* 318.
- 2 Kings iii. 19. *And ye shall smite every fenced City, and every choice City, and shall sell every good Tree.* 652.
- vi. 19. *And Elisha said unto them, this is not the Way, neither is this the City.* 535.

- viii. 10. *And Elisha said unto him, go say unto him, Thou mayest certainly recover: Howbeit the LORD hath shewed me, that he shall surely die.* ibid.
- 1 Chron. xxvi. 32. *And his Brethren, Men of Valour, were two thousand and seven hundred chief Fathers, whom King David made Rulers over the Reubenites, the Gadites, and the half Tribe of Manasseh, for every Matter pertaining to GOD, and Affairs of the King.* 125.
- 2 Chron. xix. 2. *And Jehu, the Son of Hinani the Seer, went out to meet him, and said to King Jehoshaphat, Shouldest thou help the Ungodly, and love them that hate the LORD? Therefore is Wrath upon thee from before the LORD.* 344.
- Psal. ii. 10, 11. *Be wise now therefore, O ye Kings, be instructed, ye Judges of the Earth: Serve the LORD with Fear.* 33.
- Prov. xiv. 4. *The LORD hath made all Things for himself; yea even the Wicked for the Day of Evil.* 405.
- Eccl. xii. 7. *Then shall the Dust return to the Earth as it was; and the Spirit shall return unto GOD who gave it.* 392.
- Isai. ii. 4. *They shall beat their Swords into Plowshares, and their Spears into Pruning-Hooks. Nation shall not lift up Sword against Nation, neither shall they learn War any more.* 37.
- Jer. xxxviii. 5. *Then Zedekiah the King said, Behold, he is in your Hand: For the King is not he that can do any Thing against you.* 90.
- xxxviii. 26. *Then thou shalt say unto them, I presented my Supplication before the King, that he would not cause me to return to Jonathan's House, to die there.* 523.
- Ezek. xviii. 24. *All his Righteousness that he hath done shall not be mentioned: In his Trespass that he hath trespassed, and in his Sin that he hath sinned, in them shall he die.* 430.
- Zech. v. 1, 2, 3, 4. *Then I turned and lifted up mine Eyes and looked, and behold a Flying Roll. And he said unto me what seest thou? And I answered, I see a Flying Roll, the Length thereof is*

twenty Cubits, and the Breadth thereof ten Cubits. Then said he unto me, This is the Curse that goeth forth over the Face of the whole Earth: For every one that stealeth shall be cut off, as on this Side, according to it: And every one that sweareth shall be cut off, as on that Side, according to it. I will bring it forth, saith the LORD of Hosts, and it shall enter into the House of the Thief, and into the House of him that sweareth falsely by my Name; and it shall remain in the Midst of his House, and shall consume it.

314. In the Notes, Num. 7.

- Matt. iii. 2. iv. 17. *Repent ye, for the Kingdom of Heaven is at hand.* 34.
- v. 17. *Think not that I am come to destroy the Law or the Prophets: I am not come to destroy but to fulfil.* 35.
- v. 21, 22. *Ye have heard, that it was said by them of old Time, thou shalt not kill: And whosoever shall kill, shall be in Danger of the Judgment. But I say unto you, &c.* 31.
- v. 37. *Let your Communication be Yea, yea, Nay, nay.* 327.
- v. 38, 39. *Ye have heard that it hath been said, An Eye for an Eye, and a Tooth for a Tooth; but I say unto you, resist not Evil; but whosoever shall smite thee on thy right Cheek, turn to him the other also.* 38.
- v. 40. *And if any Man will sue thee at the Law, and take away thy Coat, let him have thy Cloak also.* *ibid.*
- v. 41. *And whosoever shall compel thee to go with him one Mile, go with him two.* 39.
- v. 42. *Give to him that asketh thee, and from him that would borrow of thee, turn not thou away.* *ibid.*
- v. 43, 44. *Ye have heard that it hath been said, Thou shalt love thy Neighbour and hate thine Enemy. But I say unto you, Love your Enemies, bless them that curse you, do Good to them that hate you, and pray for them who despitefully use you and persecute you.* Page 40.
- xxiii. 13. *Hearing they may hear and not understand.* 528.

- xxiii. 21. *And whoso shall swear by the Temple, sweareth by it, and by him that dwelleth therein.* 321.
- xxiv. 51. *And shall cut him asunder, and appoint him his Portion with the Hypocrites.* 327.
- xxvi. 29. *I will not drink henceforth of this Fruit of the Vine, until that Day that I drink it new with you in my Father's Kingdom.* 528.
- xxvi. 52. *All they that take the Sword shall perish with the Sword.* 44.
- Mark vi. 48. *And he saw them toyling in Rowing: (For the Wind was contrary unto them) and about the fourth Watch of the Night he cometh unto them, walking upon the Sea, and would have passed by them.* 525.
- x. 19. *Thou knowest the Commandments, do not commit Adultery, do not steal, do not bear false Witness, defraud not.* 436.
- Luke ii. 1. *That all the World should be taxed.* 479.
- xiv. 23. *Go out into the Highways and Hedges, and compel them to come in.* 448.
- xvii. 3. *Take Heed to yourselves: If thy Brother trespass against thee, rebuke him; and if he repent, forgive him.* 417.
- xxii. 30. *That ye may eat and drink at my Table, in my Kingdom, and sit on Thrones, judging the twelve Tribes of Israel.* 528.
- xxiv. 28. *And they drew nigh unto the Village whither they went, and he made as tho' he would have gone further.* 525.
- xxiv. 29. *But they constrained him.* 448.
- John ii. 19. *Destroy this Temple, and in three Days I will raise it up.* 528.
- iv. 9. *Then saith the Woman of Samaria unto him, How is it that thou being a Jew, askest Drink of me, which am a Woman of Samaria? For the Jews have no Dealings with the Samaritans.* 343.

- viii. 7. *So when they continued asking him, he lifted up himself, and said unto them, He that is without Sin among you, let him first cast a Stone at her.* 404.
- xi. II. *Our Friend Lazarus sleepeth.* 528.
- xviii. 36. *Jesus answered, My Kingdom is not of this World: If my Kingdom were of this World, then would my Servants fight, that I should not be delivered to the Jews: But now is my Kingdom not from hence.* 480.
- Acts xvi. 3. *Him would Paul have to go forth with him; and took and circumcised him, because of the Jews which were in those Quarters: For they knew all that his Father was a Greek.* 525.
- xvii. 4. *And some of them believed, and consorted with Paul and Silas: And of the devout Greeks a great Multitude; and of the chief Women not a few.* 17.
- Rom. i. 25. *Who changed the Truth of GOD into a Lye, and worshipped and served the Creature more than the Creator, who is blessed for ever.* 446.
- iii. 27. *By what Law? Of Works?* 32.
- xii. 17, 18, 19, 20, 21. *Recompense to no Man Evil for Evil. Provide Things honest in the Sight of all Men. If it be possible, as much as lieth in you, live peaceably with all Men. Dearly Beloved, Avenge not yourselves, but rather give Place unto Wrath; for it is written, Vengeance is mine; I will repay, saith the LORD. Therefore if thine Enemy hunger, feed him; if he thirst give him Drink: For in so doing thou shalt heap Coals of Fire on his Head. Be not overcome of Evil, but overcome Evil with Good.* 42.
- xiii. I. *Let every Soul be subject unto the higher Powers.* *ibid.*
- xiii. 2. *Whosoever therefore resisteth the Power, resisteth the Ordinance of GOD: And they that resist, shall receive to themselves Damnation.* 105.

- xiii. 4. *For he is the Minister of GOD to thee for good. But if thou do that which is Evil be afraid; for he beareth not the Sword in vain: For he is the Minister of GOD, a Revenger to execute Wrath upon them that do Evil.* 32, 105.
- xiv. 23. *And he that doubteth, is damned if he eat, because he eateth not of Faith: For whatsoever is not of Faith, is Sin.* 483.
- I Cor. v. 1. *Such Fornication, as is not so much as named amongst the Gentiles, that one should have his Father's Wife.* 197.
- vii. 21. *Art thou called being a Servant: Care not for it.* 212.
- vii. 36. *But if any Man think that he behaveth himself uncomely toward his Virgin, if she pass the Flower of her Age, and Need so require, let him do what he will, he sinneth not; let them marry.* 194.
- xi. 14. *Doth not even Nature itself teach you, that if a Man hath long Hair, it is a Shame?* 311.
- 2 Cor. i. 17, 18. *Did I use Lightness? That with me there should be Yea, yea, and Nay, nay? But as GOD is true, our Word toward you was not Yea and Nay.* 327.
- i. 20. *For all the Promises of GOD in him are Yea, and in him Amen.* *ibid.*
- x. 3. *Tho' we walk in the Flesh, we do not war after the Flesh; for the Weapons of our Warfare are not carnal, but mighty through GOD, to the pulling down of strong Holds.* 42.
- 2 Cor. xi. 3. *But I fear lest by any Means, as the Serpent beguiled Eve through his Subtilty, so your Minds should be corrupted from the Simplicity that is in CHRIST.* Page 144.
- xii. 14. *Children ought not to lay up for the Parents, but the Parents for the Children.* 226.
- Gal. iii. 24. *The Law was our School Master to bring us unto CHRIST.* 23.

- iv. 1. *Now I say, that the Heir, as long as he is a Child, differeth nothing from a Servant, tho' he be Lord of all.* 161.
- Eph. ii. 3. *Among whom also we had our Conversation in Times past, in the Lusts of our Flesh, fulfilling the Desires of the Flesh, and of the Mind; and were by Nature the Children of Wrath, even as others.* 311.
- v. 11, 12. *Put on the whole Armour of GOD, that ye may be able to stand against the Wiles of the Devil. For we wrestle not against Flesh and Blood, but against Principalities and Powers, against the Rulers of the Darkness of this World, against spiritual Wickedness in high Places.* 43.
- Tim. ii. 1, 2, 3, 4. *I exhort therefore, that first of all, Supplications, Prayers, Intercessions, and giving of Thanks be made for all Men; for Kings, and for all that are in Authority, that we may lead a quiet and peaceable Life, in all Godliness and Honesty; for this is good and acceptable in the Sight of GOD our Saviour, who would have all Men to be saved, and to come to the Knowledge of the Truth.* 32.
- Tit. ii. 9. *Exhort Servants to be obedient to their own Masters, and to please them well in all Things.* 212.
- Heb. vi. 17, 18. *Wherein GOD willing more abundantly to shew unto the Heirs of Promise, the Immutability of his Counsel, confirmed it by an Oath: That by two immutable Things, in which it was impossible for GOD to lye, we might have a strong Consolation.* 316.
- vii. 16. *Who is made not after the Law of a carnal Commandment.* 32.
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- viii. 7. *For if that first Covenant had been faultless, then should no Place have been sought for the second.* *ibid.*
- xi. 6. *He that cometh to GOD must believe that he is, and that he is a Rewarder of them that diligently seek him.* 444.

- James i. 15. *Then when Lust hath conceived it bringeth forth Sin.* 428.
- iv. 1. *From whence come Wars and Fightings among you? Come they not hence, even of your Lusts that war in your Members? Ye lust and have not; ye kill and desire to have, and cannot obtain; ye fight and war, &c.* 43.
- v. 12. *But above all Things, my Brethren, swear not, neither by Heaven, neither by the Earth, neither by any other Oath, but let your yea, be yea, and your nay, nay; lest you fall into Condemnation or Hypocrisy.* 327.
- 1 Pet. ii. 16. *As free, and not using your Liberty for a Cloak of Maliciousness, but as the Servants of GOD.* 212.
- ii. 17, 18, 19, 20. *Honour the King. Servants be subject to your Masters with all Fear, not only to the good and gentle, but also to the froward; for this is Thank-worthy, if a Man for Conscience toward GOD endure Grief, suffering wrongfully. For what Glory is it, if when ye be buffeted for your Faults, ye take it patiently? But if when ye do well, and suffer for it, ye take it patiently, this is acceptable with GOD.*
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- 1 John ii. 16. *The Lust of the Flesh, the Lust of the Eyes, and the Pride of Life.* 429.
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INDEX I

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Text or in the Notes.*

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APPENDIX

Prolegomena to the First Edition of

De Jure Belli ac Pacis

A NOTE ON THE TRANSLATION

This is a translation of the Prolegomena to the first edition of *De Iure Belli ac Pacis* (1625). As will be seen by a comparison of it with the Barbeyrac text, a number of passages in the later editions are not present in it, and others have been rewritten (I have discussed some of the more important differences in the Introduction, p. ix). The division of the Prolegomena into numbered paragraphs was introduced for the first time in the edition of 1667 (along with subdivisions to the paragraphs in the main body of the text); and in an attempt to convey what Grotius himself intended, and what readers such as Hobbes, Locke, or Pufendorf saw when they read the book, I have omitted the divisions. The result looks strange to a modern eye, but it captures Grotius's prose style and avoids some of the clumsy interruptions to his argument which the 1667 editor introduced. I have translated the key term *ius* sometimes as "law" and sometimes as "right." As is well known, there is no adequate translation of this term into English, unlike other European languages (where for example *droit* captures the ambiguity of the word). In general, however, Grotius tends to use it to mean what we would call "law," as in *ius naturale*, natural law (not natural right in the sense, e.g., of Hobbes). I have tried to indicate what the original Latin term is in other difficult cases, such as *utilitas* ("utility," "interest," or "advantage"). *Utilitas* in the Roman and later tradition was consistently contrasted with *honestas* or *aequitas* ("integrity" or "fairness") (see, for example, Cicero's *De Officiis*), and Grotius uses the term with this in mind.

PROLEGOMENA TO THE
FIRST EDITION OF
DE JURE BELLI AC PACIS

Many people have undertaken commentaries and digests of civil laws, both the Roman law and that of other nations; but few people have tackled the law which mediates between different countries, or between their rulers (whether that law stems from nature itself or from custom and tacit agreement), and so far no one at all has dealt with it comprehensively and methodically, though such a thing would benefit the human race. As Cicero truly said, the master science is the one which deals with alliances, agreements and bargains between peoples, kings, and foreign nations; that is, with all the rights of war and peace. Euripides too ranked this study above the knowledge of all divine and human matters: he had Theoclymenes addressed in this way:

You, who know the affairs of Gods and men present and to come,
Are worthless still, if what is just escapes you.

Work on this subject is all the more necessary because plenty of people, both in our own time and in earlier ages, have condemned this kind of law as nothing more than an empty name. Euthydemus's remark in Thucydides is on almost everyone's lips, that for a king or state with sovereign power, nothing which is in their interest is unjust. Much the same are the sayings that when the stakes are high, success is the only justice, or that a state cannot be ruled without injustice. We can add to these the claim that the controversies which arise between nations or rulers generally have Mars as their arbiter. It is not only ordinary people who think there is a great gulf between war and law, but even learned and sensible

people often make pronouncements which foster this belief. Nothing is more common than to oppose law and arms to one another. So Ennius said

They looked to cold steel, not to law, for what they claimed.

And Horace described the ferocity of Achilles as follows:

Thinking that laws were made for other men
He carved his share with arms alone.

Lucan¹ represented a character embarking on a war as saying

With this I leave behind both peace and futile law.

Even such a modest person as Pompey could dare to say, “Why should I think of laws, with weapons in my hand?” Among Christian writers there are many passages to the same effect; one in Tertullian will stand for the others. “Deceit, savagery and injustice are the proper business of war.” No doubt those who think like this will quote to me that passage in Terence,²

Believing that your reason’s going to make
This vagueness certain, is the same as if
You thought you could go mad, and still stay sane.

It would clearly be useless to undertake a discussion of law if there is no such thing; so if I am to win acceptance for my project, I need in its defence briefly to refute this crucial error. And so that I do not have to deal with the whole crowd of my opponents, let me assign them a spokesman. Who better than Carneades, who reached what to the Academy was the summit of achievement, in that he could use his rhetorical powers just as effectively on behalf of falsehood as on behalf of truth? When he undertook the critique of justice (which is my particular subject at the moment), he found no argument more powerful than this:

1. Grotius does not mention Lucan by name, but clearly assumed that his readers would know the passage. I have inserted the name to convey his meaning to a modern audience. He does the same in a number of other places (see footnotes 2–6, below).

2. See footnote 1.

men have established *iura* according to their own interests [*pro utilitate*], which vary with different customs, and often at different times with the same people. So there is no natural *ius*: all men and the other animals are impelled by nature to seek their own interests. Consequently, either there is no justice, or if there is such a thing, it is completely irrational, since pursuing the good of others harms oneself. We should not by any means accept the truth of what this philosopher says, nor of what Horace³ said in imitation,

Nature itself will not split wrong from right.

For though man is an animal, he is one of a special kind, further removed from the rest than each of the other species is from one another—for which there is testimony from many actions unique to the human species. Among the things which are unique to man is the desire for society [*appetitus societatis*], that is, for community with those who belong to his species—though not a community of any kind, but one at peace, and with a rational order [*pro sui intellectus modo ordinatae*]. Therefore, when it is said that nature drives each animal to seek its own interests [*utilitates*], we can say that this is true of the other animals, and of man before he came to the use of that which is special to man [*antequam ad usum eius quod homini proprium est, pervenerit*]; though we should also make this exception in the case of the other animals, that their pursuit of their own interests is tempered by a regard partly for their own offspring, and partly for the other members of their species. We believe that this proceeds in their case from some extrinsic principle of intelligence, since a similar intelligence does not appear in other actions of theirs which are equally difficult. In the case of men, however, when they perform such actions, it is reasonable to suppose that they stem from some internal principle, which is associated with qualities belonging not to all animals but to human nature alone. This care for society in accordance with the human intellect, which we have roughly sketched, is the source of *ius*, properly so called, to which belong abstaining from another's possessions, restoring anything which belongs to another (or

3. See footnote 1.

the profit from it), being obliged to keep promises, giving compensation for culpable damage, and incurring human punishment. From this concept of *ius* arises another and more extensive one. Since men not only have this social instinct [*vim socialem*] more than other animals, but also possess the capacity to assess pleasures or pains [*quae delectant aut nocent*], both immediately and in the future, and to make judgments about what will conduce to them; we should understand that it is appropriate to human nature rationally [*pro humani intellectus modo*] to follow good judgment in these matters, and not be disturbed by fear or the lure of immediate pleasure, and that whatever is plainly contrary to good judgment is also contrary to the law of nature (that is, of human nature). As a result it behooves us when distributing resources responsibly to individuals or groups to ensure that we give more weight to the intelligent [*sapiens*] than to the less intelligent, more to a neighbor than to a stranger, and more to the poor than to the rich, as their conduct and the nature of the case requires. In the past many people took this to be part of *ius* properly and strictly so called, whereas *ius* accurately understood is very different in its character, as it consists in refraining from taking what belongs to another person, or in fulfilling some obligation to them. What I have just said would be relevant even if we were to suppose (what we cannot suppose without the greatest wickedness) that there is no God, or that human affairs are of no concern to him: the contrary of which on the one hand is borne in upon us (however unwilling we may be) by an innate light in our soul, and on the other is confirmed by many arguments and by miracles witnessed down the ages. It follows that without exception we should obey God as our creator to whom we owe everything, especially as he has revealed himself repeatedly as the best and most powerful being, who can give his followers great and eternal rewards; and we ought to believe that he wishes to do so all the more if he has promised it in so many words: which we Christians, following the ancient Hebrews, believe on the basis of unquestionable trust in the testimonies of his will. The free will of God gives rise to another *ius* in addition to that of nature, and our reason [*intellectus*] irrefutably tells us that we should submit to it. Moreover, despite the fact that natural *ius*, with which I am concerned, whether we think of it as the basis of

society or take it more loosely [*sive illud sociale, sive quod laxius ita dicitur*], necessarily derives from intrinsic principles of a human being [*ex principiis homini internis necessario profluit*], it can also justly be attributed to God, since he willed that there should be such principles in us. It was in this sense that Chrysippus and the Stoics said that one should simply seek the origin of *ius* in Jove himself. The word *ius* in Latin indeed probably comes from the name *Iovis*. Among men our parents are like Gods of a kind, to whom not infinite but appropriate honor is due. Now, since it is part of the *ius naturae* that we keep our promises (for it was necessary that men should have some way of obliging themselves, and no other natural means can be conceived), civil laws [*iura civilia*] stem from the same source. For when people form themselves into a society [*coetus*] or subject themselves to some man or men, they have either expressly promised, or should be presumed from the nature of the arrangement to have tacitly promised, that they will agree with whatever the majority of the society, or the bearers of authority in it, have decided upon. Accordingly, what not Carneades alone but others as well have said,

Utility [*utilitas*] might be called the mother of justice and equity,

is not true, if we speak accurately: for human nature itself is the mother of natural law, as it drives us to seek a common society [*societatem mutuam*] even if there is no shortage of resources: the mother of civil law is the obligation which arises from agreement, and since that gets its force from natural law, nature can be termed the grandmother of civil law. But utility is annexed to the natural law: the author of nature willed that as individuals we should be weak and in need of many things if we are to lead a good life, in order that we should be all the more impelled into living in society; and utility is the occasion of civil law [*iuri autem civili occasionem dedit utilitas*], since what I have termed association or subjection originally came into existence for the sake of some interest [*utilitatis*]. It is also the case that anyone who prescribes laws for other people usually does so with a view to increasing utility, or at least ought to do so. But just as the laws of each state [*civitas*] consult the utility of that state, so there could be (and indeed there seem actually to be) laws be-

tween states—either between all states or between a number of them—which consult the utility not of the individual societies but of their totality. This is what is termed “the law of nations,” insofar as we distinguish that law from the law of nature. Carneades omitted this kind of law when he categorized all laws as either the laws of nature or those of particular nations, though since he was dealing with the law which governs international relations (for the subject of his lecture was “war and its consequences”), he ought to have dealt with it above all. So Carneades was wrong when he stigmatized justice with the name of irrationality: for just as on his own account a citizen is not irrational who obeys the civil law of his state, even though doing so may require the citizen to forgo some personal benefit, so a nation is not irrational if it does not pursue its own interest at the expense of the common laws of nations. The reasoning is the same in each case: a citizen who breaks the civil law for the sake of some immediate interest will thereby undermine his own and his descendants’ permanent interests, and a nation which violates the laws of nature and nations will have renounced its right [*rescindit munimenta*] subsequently to live in peace. So even if no benefit is to be expected from obedience to a law, it is wise and not irrational to do what we feel we are led to by our nature. By the same token, it is not invariably true that

We ought to say that from fear of injustice came laws;

or, as Plato puts the same thought, laws were invented from a fear of suffering injury, and it was violence which got men to cultivate justice. Strictly speaking, this applies only to those practices [*instituta*] and laws which were devised to help with instituting relationships of justice: many people who were individually weak got together to found and maintain with their collective strength a legal system [*iudicia*], so that they would not be oppressed by the more powerful, and that what they could not achieve separately would be within their power as a community. It is in this sense that it can reasonably be said that what is right is what benefits the most powerful, when we understand that a system of right can secure its external objective only with the help of force. Moreover, laws can still have an effect even without any violence annexed

to them. For justice leads to a secure conscience, while injustice leads to the torment and laceration which Plato depicts in the hearts of tyrants; the common consent of upright people approves of justice and condemns injustice; and, most importantly of all, God is hostile to injustice and a friend to justice. Though he keeps his judgments for when we are dead, he nevertheless often represents their power to us in this life, as history tells us with many instances. Many people require the practice of justice from citizens but do not bother about it from nations or the rulers of nations. The principal cause of their mistake is that they are looking only to the utility which arises from laws, which is obvious in the case of citizens who cannot enjoy security as separate individuals, while great states which seem to possess all the resources needed for a properly secure existence apparently have no use for the virtue which involves other people, namely justice. But without repeating what I have already said, laws are not instituted for the sake purely of utility, and there is no state so powerful that it might not need some help from people outside it, whether for trade, or for protecting itself from the strength of many foreign nations united in opposition to it. This is why we see even the most powerful nations and kings seek alliances, the whole force of which is undermined by those who restrict laws to the internal affairs of states. The great truth is that everything is insecure as soon as we abandon laws. If no community can preserve itself without law (as Aristotle showed with his famous example of the brigands), so the community which all human beings, or a multiplicity of nations, construct among themselves certainly requires laws. Cicero⁴ recognized this when he said that evil actions should not be committed even for the sake of our country. Pompey too, whom we mentioned just now as taking the opposite view, when a Spartan king said to him that the happiest state was one whose boundaries spread as far as the spear and sword could take them, denied it, asserting that the happiest state made justice its frontier. He might also have used the authority of another Spartan king, who ranked justice above military valor, on the grounds that bravery should be governed by some kind of justice, and that if all men were

4. See footnote 1 above.

just, they would not need courage. Themistius in his speech to Valens said persuasively that kings who are governed by the rule of wisdom are concerned not merely with the one nation assigned to them, but with the whole human race, and are (as he termed them) not solely “Macedonophiles” or “Romanophiles” but “Philanthropists.” What some people say, that in war all laws cease, is completely unacceptable: rather, war should only be undertaken in the pursuit of rights, and once under way should be conducted according to the measure of law and honesty [*fides*]. Demosthenes was right when he said that war was to be used against those who could not be constrained by judicial processes. Those processes have force only against people who think of themselves as subject to them, while war should be mounted against people who make themselves out to be the equals of their judges—though it should definitely be conducted with no less scrupulousness [*religio*] than we are accustomed to in courts. If “laws are silent among arms,” this is true only of civil laws and of laws relating to the judiciary and the practices of peacetime, and not of the other laws which are perpetual and appropriate to all circumstances. Dio Prusaensis put it well: between enemies no notice is to be taken of written, that is, civil, laws, but notice must be taken of the unwritten laws which nature dictates, or the agreement of nations has established. The old Roman formula illustrates this: “I believe that these things are to be sought through a pure and holy [*pius*] war.” Those ancient Romans, as Varro observed, undertook their wars cautiously and in a disciplined fashion, since they thought that no war should be waged unless it was holy. Camillus said that war ought to be waged with no less justice than courage; and in Livy⁵ we read, “There are laws [*iura*] of war just as there are of peace.” Seneca⁶ admired Fabricius as a great man because he succeeded in the most difficult task of preserving his innocence in a war, and because he believed that some acts were utterly wrong even when committed against an enemy. Historians constantly demonstrate how much influence a conviction of justice carries in warfare, and often ascribe victory to this cause above all. It is

5. See footnote 1.

6. See footnote 1.

proverbial that the strength of a soldier waxes and wanes with his cause; that he who takes up unjust arms rarely comes home intact; that hope is the companion of a good cause; and so on. The fortunate success of unjust projects should not influence us: it is sufficient that the fairness of a cause has a determinate—and great—motive force, even though that force (as happens in human affairs) is often impeded in its effects by some other countervailing causes. The belief that we do not go to war casually or unjustly, but conscientiously [*pie*], plays a major part in sustaining friendships, which are as advantageous in all sorts of ways to nations as they are to individuals. For no one will readily ally with anyone who thinks that law, morality, and honesty [*ius, fas, fidem*] are worthless. Because of the reasons I have given, I am in no doubt that there is some common law [*ius commune*] among nations which applies to war and its conduct; so there are many urgent issues leading me to take up my pen. I have seen a wantonness in warfare among Christians which would be shameful even among barbarians; I have seen men run to arms for frivolous or nonexistent reasons, and having taken them up, show no reverence for divine or human law, as if at a word their fury had been unleashed and they were capable of any crime. Many highly decent men have been led by this spectacle of inhumanity to suppose that all weapons should be forbidden for the Christian, whose way of life commits him to love all men; these include at times both Johannes Ferus and Erasmus, our countrymen, each of them dedicated to peace in the Church and the State. But I think they have followed the familiar practice of going from one extreme to the other in the pursuit of truth. This attempt to go too far in the other direction often causes more harm than good, since their extremism in one area loses them respect as far as their more reasonable claims are concerned. We should therefore remedy their arguments, so that people are not encouraged to believe either nothing or everything that they say. In addition, I wanted to advance the study of jurisprudence: something which I used to practice in public affairs with as much integrity as I could, but which I now have to pursue as a private citizen, since I have undeservedly been exiled from the land which I worked so hard to serve. Many people have already tried to put it into a systematic form [*artis formam*], but no one has succeeded; nor

will they, until there is a proper distinction made between what is conventional and what is natural, to which no one yet has paid full attention. For natural principles, being always the same, are easily put into a systematic form, whereas conventional principles, which often change and which vary from place to place, like other collections of particulars cannot be handled systematically. So if the experts [*sacerdotes*] on true justice were to undertake to deal with the different parts of natural and perpetual jurisprudence, they should first set to one side everything which derives from the free will. Then one of them should deal with laws, one with tributes, one with the role of judges, one with the estimating of intentions [*voluntatum coniectura*], and one with the establishing of belief about facts; having done all this, a body of knowledge could be put together out of the discrete parts. For my part, I will show what approach I want to take not in words now, but by the material itself in this work, which contains what is by far the most significant part of jurisprudence. In the first book of the work I examined the general question of the origin of law, and whether any war can be just. Next, in order to understand the distinction between public and private war, I had to analyze the powers of sovereignty: which peoples and which kings have it undivided [*solidam*], which hold part of it, which have the right to alienate it, and which do not. Then I had to discuss the duties of subjects toward their superiors. In the second book I discussed all the causes which give rise to war. I went into detail about which things are common and which private property; what rights people can have over other people; what obligation stems from ownership; what are the rules for royal succession; what rights arise from agreements or contracts; what is the force of treaties and oaths (both public and private), and how we interpret them; what compensation is due for offences; what protection is accorded to ambassadors; what right we have to bury our dead; and what is the nature of punishments. The subject matter of the third book is, firstly, what is lawful in the course of a war. Secondly, it distinguishes between actions which in practice go unpunished or are even treated by exotic nations as legitimate, and those which are genuinely not wrong; while lastly it deals with the types of peace agreement, and all the conventions admitted in wartime. The value of this work seems all the greater because, as I have

said, no one has handled the whole of this argument, and those who have handled parts of it have done so in such a way that much is left to the industry of others. Nothing survives of this kind from the Ancient Philosophers: neither from the Greeks (among whom Aristotle wrote a book called *The Justifications of War*), nor from the Latin authors, and not even from the early adherents of Christianity, whose works we would welcome above all. Nothing has even descended to us of the ancient Roman books of the fetial law, other than the name. Those who wrote *summae* of so-called cases of conscience included in their range of topics chapters on war, on promises, on oaths, and on reprisals. I have also looked at the specialized works on the laws of war, some of which are composed by theologians such as Franciscus Victoria, Henricus Gorichemus, or Wilhelmus Matthaei and others by jurists such as Ioannes Lupus, Franciscus Arius, Ioannes de Lignanus, or Martinus Laudensis; but all of them say very little about such a rich subject, and they are mostly very muddled and confused about which laws are natural, which divine, which are part of the law of nations, which are civil laws, and which belong to canon law. The great deficiency in all of these writers was that they lacked the illumination provided by History. Attempts to supply the deficit were made, first, by the most learned Faber in some chapters of his *Semestria*, but in his own fashion, and with an excessive citation of sources; then in a more extensive manner, and with their masses of examples organized in accordance with some definitions, by Balthazar Ayala and, especially, Albericus Gentilis. I know that others may be helped by his diligence, and I admit that it has helped me; so I leave it to his readers to judge what is lacking in the way he distinguishes between questions and between different types of law. But I will say this, that when he discusses a controversy he tends to follow either a few ill-founded examples, or the authority of recent Jurisconsults in their answers; and many of those were written on behalf of clients, and not with a view to what is right or good. Ayala did not deal with the reasons why a war might be called just or unjust; and while Gentilis outlined the principal topics in his distinctive fashion, he did not deal at all with many aspects of the most important and persistent controversies. I have taken pains to consult anything relevant which is in print, and have given the

sources for my judgments in order to make it easy to determine even the matters which I have left out. It remains for me briefly to set out the resources I have used and what my concerns have been in the project. My prime concern has been to base my examination of what belongs to the law of nature on ideas which are so certain that nobody can deny them without doing violence to their fundamental being [*nisi sibi vim inferat*]. The principles of natural law are clear and self-evident, to a much higher degree than the things which we perceive with our outward senses—even though our senses do not fail us if their organs are working properly and other necessary conditions are met. So Euripides in his *Phoenissae* made Polynices, whose cause he wanted to be obviously just, say that

What I am saying, Mother, is not encircled with mysteries,
But finds its support in the rules of the right and the good
Which the masses see always as clearly as men of great learning.

The judgment of the chorus promptly confirmed this view (and it consisted of women, and barbarian women at that). In investigating this law, I have benefited from the testimony of philosophers, historians, poets, and, lastly, orators. One should not naively believe whatever they say, since they are often loyal to a particular party, program, or cause; but what is affirmed by many people at different times and places to be obvious must be presumed to rest on some universal reason. In the issues we are considering, this reason can only be either a correct deduction from the principles of our nature, or some general agreement. The former means that it is a law of nature, the latter that it is a law of nations. The distinction between these two categories is not to be gathered from their writings (for the authors continuously confound the terms “law of nature” and “law of nations”), but from the character of the material. For whatever cannot be deduced by sure reasoning from definite principles, but is nevertheless found everywhere, must have arisen from some voluntary act. Accordingly, I have constantly put special effort into distinguishing between these two laws, as much as into distinguishing both of them from the civil law. In the case of the law of nations I have discriminated between genuine law, found everywhere, and that which

strictly speaking produces some external effect in imitation of the fundamental law—for example, it is most definitely and clearly legitimate to resist violence, but everywhere people are obliged to use the public powers to defend themselves, for the sake of some advantage or to avoid serious inconveniences. It will be clear as I develop the argument of this work how relevant this observation is to many issues. I have also been anxious to distinguish rights properly and strictly so called, which give rise to some obligation of restitution, from actions which we call right because it would be against the dictate of right reason to behave in some other way; I have already touched on this distinction. Among philosophers Aristotle is reckoned the king, whether you take into account the structure of his arguments, his sharpness in making distinctions, or the weight of his reasons. But I wish that his rule had not been transformed into tyranny, so that there is now nothing which oppresses truth, on whose behalf Aristotle was such a zealous and loyal worker, more than the name of Aristotle himself. Here and elsewhere I copy the freedom of the early Christians, who forswore loyalty to any school of philosophers; not because they agreed with those who say that nothing can be known (that is the most ridiculous thing to say), but because they thought that no school was right about everything, and each school had some merit. So they believed that to put together the truths distributed among different individuals and schools was equivalent to setting out the authentic teachings of Christianity. Among other things, I would say in passing, as it is relevant to my discussion, that I think some Platonists and the early Christians were quite right to dissent from Aristotle's doctrine that virtue lies in a mean of emotions or actions. His commitment to this view led him to treat quite disparate virtues as if they were identical, such as generosity and thrift; and to posit that truthfulness had as its opposite two vices of greatly differing significance, boastfulness and dissimulation. He also labeled a number of things as vices which are either nonexistent or are not wrong in themselves, such as contempt for pleasure or honors, and the failure to feel anger at other men. The error of such a sweeping definition is clear from the case of justice: when his inspection of emotions and their corresponding actions failed to locate the opposing extremes between which justice was supposed to lie, he

turned to the objects themselves with which justice deals. First, this was to switch between categories, which he himself rightly condemned in others; and second, to take less than one is owed (though it might contingently be a vice, if one had responsibility for the welfare of oneself or others) cannot be antagonistic to justice, since justice simply consists in respecting someone else's rights [*tota in alieni abstinentia posita est*]. A similar delusion led him to say that if adultery was the consequence of lust, or murder the consequence of anger, then they could not properly be called acts of injustice. In fact, injustice simply consists of taking what belongs to someone else, and it does not matter whether it stems from greed, or lust, or anger, or an improvident benevolence; or from the desire to excel, which is the source of the greatest injustices. As long as our reason for resisting an incentive to behave in some way is solely that doing so would undermine human association, then that is what it is to be just. To return to my earlier theme: while it is true of some virtues that they involve the moderation of our emotions, this is not because it is an intrinsic and universal feature of every virtue, but because right reason (which virtue follows everywhere) in some things prescribes moderation, and in others urges excess. Thus it is not possible to revere God too much (what is wrong with superstition is not that God is excessively worshiped, but that it is a perverse kind of reverence); nor can we have an immoderate desire for eternal blessings and an excessive fear of damnation; nor can we hate sin too much. So I intend to set great value on Aristotle, but to treat him with the same freedom with which he treated his teachers in his zeal for truth. Works of history are useful for my argument in two ways, for they provide both examples of conduct, and moral judgments upon them. Examples from the best periods and cultures [*populi*] carry the most authority, so I have selected those from the Ancient Greeks and Romans in preference to any others. Nor have I rejected their judgments, especially where everyone was in agreement: for while the law of nature (as I have said) may be determined in other ways, the law of nations is established solely by general agreement. The remarks of the poets and orators have less weight, and I have used them not so much to bolster my case as to add some elegance to what I want to say. I have often deferred to the authority of the books which men

wrote (or received) under the inspiration of God, but I have differentiated between the old and the new law. Some people say that the old law is the law of nature itself, but there is no doubt that this is false: much in the old law comes from the free will of God, though it is compatible with the true law of nature. To that extent we can use it as a basis for our discussion, provided that we distinguish carefully between a law of God enforced upon men by God on some limited occasion, and a law men have constituted for themselves [*dummodo distinguamus accurate ius Dei quod Deus per homines interdum exsequitur, et ius hominum inter se*]. I have tried as far as I could to avoid this error, as well as its opposite, that of supposing that once the new covenant came in, nothing of the old covenant mattered any more. I dissent from this view partly because of what I have just said, and partly because the character of the new covenant is such that whatever is prescribed in the old covenant about moral virtues is prescribed in the same terms, or more fully, in the new. We find the early Christian writers using examples from the old covenant in this way. And the Hebrew commentators can give us not a little assistance in interpreting the books of the old covenant, especially those who had good knowledge of the language and customs of their people. I use the new covenant to demonstrate what Christians are permitted to do, since there is no other way to determine it. But (in opposition to what many claim) I distinguish the new covenant from the law of nature, as I am sure that a much greater holiness is enjoined upon us by the most sacred law of the new covenant, than is required of us by the law of nature in itself. But I have not failed to note that where things are commended to us rather than commanded, then, just as we understand that to refuse commands is a sin and leaves us liable to punishment, so someone with a generous mind will follow the counsels of perfection, and will not fail to reap a reward. The canons of the authoritative Councils are selections from the general pronouncements of the divine law, adjusted to particular circumstances; they too illustrate what the divine law requires, or encourage us to do what God urges. And this is indeed the role of the Christian Church: to hand down what God transmitted to it, in the form in which it was transmitted. But the customs which the early Christians (at least, those who deserved to bear

such a great name) accepted and praised are rightly treated as of equal value to the canons. Next in authority are those who enjoyed a great reputation among Christians in their own time (whenever it may have been) for their piety and doctrine, and were not reckoned to have made any grave errors. For what they say with great assurance, as if they were certain of it, ought to carry no small weight in the interpretation of obscure passages in the scriptures, especially when many of them seem to agree, or when they are close in time to the period of early purity, before power and intrigue had corrupted the original truth. The Scholastics, who followed them, often show how much they are to be admired for their cleverness. But they happened to live in an unfortunate age, ignorant of proper liberal arts [*artium bonarum*]; so we should not be surprised that, while there is much to be praised in their work, some of it at the same time has to be excused. However, when they agreed about some moral matter, they were seldom in error; for they were exceedingly quick at seeing the faults in other people's arguments. And even in their enthusiasm for contradicting one another, they set an admirable example of modesty: for they fought among themselves with reasons and not with the insults which defile contemporary literature, and are the shameful products of impotent minds. There are three kinds of professors of Roman law. The first are those whose works are to be found in the Pandects, the Codes of Theodosius and Justinian, and the Novellae. The second are those who came after Irnerius, such as Accursius, Bartolus, and all the rest, who ruled in the courts for a long time. The third comprises those who joined the humanities [*humaniores literas*] to the study of law. I defer on many matters to the first group, for they provide an excellent and copious set of arguments to show that something is part of the law of nature, and often supply examples of the law of nations as well as the law of nature—though they are as prone as everyone else to confuse the two terms, and indeed frequently use the term “law of nations” to describe a practice which is strictly speaking of only limited extent, and is not based on agreement but on one nation imitating another, or on some chance similarity. And they often carelessly merge what genuinely belongs to the law of nations into their discussion of Roman law, as in the title “Captives and *Postliminium*.” So I have worked hard to make the

appropriate distinctions. The second group of professors were uninterested in divine law and ancient history: they tried to decide all the controversies of kings and peoples by reference to the Roman law, with the occasional admixture of canon law. They too were precluded by the misfortune of their period from properly understanding Roman law, but in other respects they were fairly sharp at discerning what is good or fair. As a result they are often the best authors to rely on for legislation, even if they are bad interpreters of preexisting laws. We should pay them most attention when they give an example of some custom which is now taken to be the law of nations. The third group of teachers, who restricted themselves to the Roman law, and who either neglected the common law of mankind [*ius illud commune*] or discussed it in a superficial fashion, have nothing useful to add to my argument. Two Spaniards, Covarruvia and Vasquius, have linked scholastic subtlety to knowledge of civil and canon law, and have not held aloof from the controversies of peoples and kings. Vasquius has handled the issues with great boldness [*libertate*], while Covarruvia has approached them more cautiously, and with a fairly good judgment. The French have tried to incorporate history into the study of law. The most distinguished of them have been Bodinus and Hottomanus; the former produced a connected work while the latter gave us a scattered set of questions. Their assertions and arguments will often prove useful in this inquiry. In the whole work I have made three fundamental commitments. One is to make the reasons for my propositions as obvious as possible; the second is to set out the material of my discussion in a systematic order; and the third is clearly to distinguish like cases from unlike.⁷ I have abstained from discussing questions of utility [*quid ex usu sit facere*], which are appropriate to some other work; those questions belong to a special political science [*artem*], which Aristotle rightly handled by itself, without any extraneous material—unlike Bodin, who confused this science with the kind of legal analysis [*arte*] which I have undertaken. I have on some occasions men-

7. Literally, “that I might clearly distinguish what can be seen as the same as each other and what are not” (*ut quae eadem inter se videri poterant nec erant, perspicue distinguerem*).

tioned what is in people's interests [*quod utile est*], but in passing, and in order to distinguish it from what is just. If anyone accuses me of being concerned with the controversies of our own time (whether current or about to break out), they will do me an injustice: I affirm that, just as mathematicians treat geometrical figures as abstracted from material objects, so I have conceived of law in the absence of all particular circumstances. As for my prose style, I did not want my readers (whose interests I did consider) to feel overwhelmed by a verbose treatment of so many different issues, so I have tried wherever possible to be concise and to convey my meaning clearly, with the hope that people engaged in public affairs will take in at a single glance both the kinds of disputes which arise in this field, and the principles for deciding them. Once they have absorbed the principles they will easily find their own way of expressing them, and can develop them as much as they like. I have periodically given quotations from ancient writers, where they seemed to carry particular weight or lend a special elegance to what I was saying; sometimes I have left a quotation in Greek, where it was short or where I could not hope to match its charm in a Latin translation, but I have always added a Latin version for the benefit of those who know no Greek. I sincerely pray that anyone who picks up this work will treat me with the same lack of deference [*libertatem*] which I have shown to the ideas and writings of other people; I will correct any error as soon as it has been brought to my attention. Lastly, if I have said anything contrary to piety, or morality, or Scripture, or the common agreement of the Christian Church, consider it unsaid.

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- Dumoulin, *see* Molinaeus.
- Duns Scotus: Ioannes Duns Scotus (ca. 1265–1308, Scottish theologian), *Quaestiones in III libros Sententiarum et Quodlibetales*, Venice, 1617.
- Durandus, *see* Guilielmus Durandus.
- Edictum Childeberti: Childebert I (d. 558, king of the Franks), *Decretio Childeberti regis*, in Lindenbrogius, *Codex* (q.v.).
- Edictum Rothari: Rotharis (d. 652, king of the Lombards), *Leges Longobardorum quas Rotharis Rex . . . composuit iussitque Edictum appellari*, in *Originum ac germanicarum antiquitatum libri, opera Basilii Ioannis Herold*, Basel, [1557].
- Edictum Theodorici: Theodoric (457–526, king of the Ostrogoths), *Edictum Theodorici regis*, in Lindenbrogius, *Codex* (q.v.).
- Eginhardus: Eginhartus (ca. 770–840, French historian), *Vita et gesta Karoli cognomento Magni*, in *Corpus Francicae Historiae* (q.v.).
- Epitome ed. a Frehero: *Gesta regum Francorum epitomata*, in *Corpus Francicae Historiae* (q.v.).
- Erasmus: Desiderius Erasmus (1465–1536, Flemish humanist), *Encomium moriae* [together with Iustus Lipsius, *Satyra Menippaea*, and P. Cunaeus, *Sardi venales*], Leiden, 1617.
- Everardi, *see* Nicolaus Everardi.
- Faber (A.): Antonius Faber (1557–1624, French jurist), *Codex Fabrianus definitionum forensium et rerum in sacro Sabaudiae Senatu tractatarum*, Lyons, 1606; *Coniecturarum iuris civilis libri sex priores, ed. tertia*, Lyons, 1605; *De Montisferrati Ducatu contra duces Mantuae pro Duce Sabaudiae consultatio*, Lyons, 1617.

- Faber (J.), *see* Johannes Faber.
- Faber (P): Petrus Faber (1540–1600, French jurist), *Semestrium liber unus*, Lyons, 1590; *Commentarius ad titulum de diversis regulis juris antiqui*, Lyons, 1566.
- Felinus Sandeus: Felinus Sandeus (ca. 1444–1503, Italian canonist), *Commentariorum in Decretalium libros V pars prima [secunda, tertia]*, Basel, 1567.
- Fernandez: Tellus Fernandez (sixteenth-century Spanish jurist), *Prima pars commentariorum in primas triginta et octo leges Tauri, secunda editio*, Madrid, 1595.
- Ferus: Johannes Ferus (1494–1554, German theologian), mentioned *Preliminary Discourse XXX*, without specifying a title.
- Fichardus: Ioannes Fichardus (1512–81, German jurist), *Consiliorum tomus primus*, Frankfurt on Main, 1590.
- Firmanus, *see* Johannes Bertachinus.
- Flodoardus: Flodoardus (894–966, French historian), *Historiarum [Remensis] Ecclesiae libri IV*, Paris, 1611.
- Fontanon: Antoine Fontanon (fl. 1589, French jurist), *Les edicts et ordonnances des rois de France*, par Antoine Fontanon, tome troisieme, Paris, 1611.
- Fortescue: Iohannes Fortescue (d. ca. 1485, English jurist), *De laudibus legum Angliae*, London, 1616.
- Fortunius Garcia: Fortunius Garcia (fl. 1514, Spanish jurist), *De ultimo fine iuris canonici et civilis*, in *Tractatus universi iuris* (q.v.); *Repetitio in I. Manumissiones, ff. de iustitia et iure*, in *Repetitiones in varia iurisconsultorum responsa*, Lyons, 1553.
- Franciscus a Ripa, *see* Ripa.
- Franciscus Arius, *see* Arias.
- Franciscus de Accoltis: Franciscus de Accoltis de Aretio (1418–ca. 1485, Italian canonist), *Consilia*, [Lyons], 1529.
- Franciscus Zabarella: Franciscus Zabarella (1360–1417, Italian canonist), *Consilia*, Venice, 1581; *Commentarii in Clementinarum volumen*, Lyons, 1511.
- Francus, *see* Philippus Francus.
- Fraxinus Canaeus, *see* Philippe Canaye.
- Fredegarius: Fredegarius Scholasticus (fl. ca. 660, French chronicler), *Chronicarum liber*, in *Corpus Francicae Historiae* (q.v.).
- Freherus, *see* Corpus Francicae Historiae and Epitome ed. a Frehero.
- Freitas: Seraphinus de Freitas (d. 1622, Portuguese canonist), *De iusto imperio Lusitanorum asiatica*, Valladolid, 1625.

- Friderus Mindanus: Petrus Friderus Mindanus (d. 1616, German jurist), *De mandatis et monitoriis iudicialibus sine clausula tractatus, Liber secundus*, Frankfurt on Main, 1596.
- Froissart, *see* Jean Froissart.
- Frossardus, *see* Jean Froissart.
- Fulgosius, *see* Raphael Fulgosius.
- Gabrielius: Antonius Gabrielius (d. 1555, Italian canonist), *Communes conclusiones in septem libros distributae*, Frankfurt, 1597.
- Gail: Andreas Gail (1525–87, German jurist), *Practicarum observationum libri duo*, Cologne, 1608 [second part: *De pace publica, De pignorationibus, De arrestis*].
- Garatus, *see* Martinus Laudensis.
- Gentilis: Albericus Gentilis (1552–1608, Italian jurist), *De jure belli libri III*, Hanover, 1612; *De legationibus libri tres*, Hanover, 1594; *Hispanicae ad vocationis libri duo*, Hanover, 1613.
- Gl. [i.e., Glosa], *see* Accursius.
- Goeddaeus: Johannes Goeddaeus (1555–1632, German jurist), in *Consilia Marpurgensia* (q.v.).
- Gomezus (A.): Antonius Gomezus (fl. 1550, Spanish civil lawyer), *Commentariorum variorumque resolutionum juris civilis communis et regii tomi tres*, Frankfurt, 1596.
- Gomezus (L.): Ludovicus Gomesius (1494–1553, Spanish jurist), *Commentaria super titulo Institutionum de actionibus*, in *De actionibus titulus Institutionum, commentariis Iasonis Mayni illustratus etc.*, Venice, 1574.
- Gorcumensis, *see* Henricus Gorcumensis.
- Grammaticus: Thomas Grammaticus (ca. 1473–1556, Italian jurist), *Decisiones Sacri Regii Consilii Neapolitani*, Frankfurt on Main, 1573.
- Gregorius Magnus: Gregory I, Pope (ca. 540–604), *Epistolae*, in his *Omnia quae extant opera*, Antwerp, 1572.
- Gregorius Turonensis: Gregory of Tours (544–594, French historian), *Historiarum libri X*, in *Corpus Francicae Historiae* (q.v.).
- Grotius: [Hugo Grotius], *Mare liberum sive de iure quod Batavis competit ad Indicana commercia dissertatio*, Leiden, 1609.
- Gryphiander: Iohannes Gryphiander (d. 1652, German historian), *De insulis tractatus, ex iurisconsultis, politicis, historicis et philologis collectus*, Frankfurt, [1623].
- Guenois: Pierre Guenois (1520–ca. 1600, French jurist), *La nouvelle conférence des ordonnances et edicts royaux*, Paris, 1642.

- Guicciardinus: Franciscus Guicciardinus (1482–1540, Italian humanist), *Historiarum sui temporis libri viginti, ex italico in latinum sermonem conversi*, Basel, 1566.
- Guido de Baysio: Guido de Baysio (“Archidiaconus”) (fl. 1290, Italian canonist), *Commentaria Rosarium appellata in volumen Decretorum*, Milan, 1508.
- Guido Papa: Guido Papa (ca. 1400–ca. 1475, French jurist), *Decisiones Parlamenti Dalphinalis Gratianopolis*, Lyons, 1534.
- Guilielmus de Monteferrato: Guilielmus de Monferrat (fifteenth-century French jurist), *Tractatus de successione regum*, in *Tractatus universi juris* (q.v.).
- Guilielmus Durandus: Guilielmus Durandus (ca. 1237–96, French canonist), *Speculum iuris, Pars prima et secunda*, Basel, 1574.
- Guilielmus Neubrigensis: Guilielmus Neubrigensis (1136–98, English historian), *De rebus Anglicis libri quinque*, Paris, 1610.
- Guillimanus: Franciscus Guillimannus (fl. 1610, Swiss historian), *De rebus Helvetiorum sive antiquitatum libri V*, Fribourg, 1598.
- Guntherus: Guntherus (fl. 1205, French Cistercian), *Ligurinus sive de gestis Friderici libri X*, in Otto Frisingensis (q.v.).
- Haraeus: Franciscus Haraeus (d. 1632, Dutch historian), *Annales ducum seu principum Brabantiae totiusque Belgii*, Antwerp, 1623.
- Harmenopulus: Constantinus Harmenopulus (1320–80, Greek jurist), *Promptuarium iuris*, [Geneva], 1587.
- Heigius: Petrus Heigius (1558–99, German jurist), *Quaestiones juris tam civilis quam Saxonici*, Wittenberg, 1619.
- Helmoldus: Helmoldus (d. ca. 1183, German historian), *Chronica Slavorum seu Annales Helmoldi, presbyteri Buzoviensis, hisque subiectum derelictorum Supplementum Arnoldi, abbatis Lubecensis, opera et studio Reineri Reineccii*, Frankfurt, 1581.
- Henricus de Segusio, *see* Hostiensis.
- Henricus Gorcumensis: Henricus de Gorychum (ca. 1386–1431, Flemish theologian), *Tractatus de iusto bello*, in his *Tractatus consultatorii*, [Cologne, 1503].
- Henriquez: Henricus Henriquez (1536–1608, Portuguese Jesuit), *Summae theologiae moralis libri quindecim*, Maintz, 1613.
- Herrera: Antonio de Herrera (1559–1625, Spanish historian), *Historia general de los hechos de los Castellanos en las islas i tierra firme del mar oceano*, Madrid, 1615.

- Hieronymus de Monte: Hieronymus de Monte, *Tractatus de finibus regundis*, Venice, 1556.
- Hincmarus: Hincmarus (806–82, French bishop and historian), *Opuscula et epistolae Hincmari Remensis archiepiscopi*, Paris, 1615; *Opusculum de divorzio Hlotarii regis et Tedtbergae reginae*, in *Opuscula: Vita S. Remigii scripta ab Hincmaro*, in *Vitae sanctorum ex probatis auctoribus et mss. codicibus per Laurentium Surium editae*, Cologne, 1617.
- Hispania illustrata: *Hispaniae illustratae seu rerum urbiumque Hispaniae, Lusitaniae, Aethiopiae et Indiae scriptores varii* [ed. A. Schottus], Frankfurt, 1603.
- Honorius: Philippus Honorius (seventeenth-century Italian humanist), *The-saurus politicus, hoc est selectiores tractatus etc.* [auctoribus variis], Frankfurt, 1617.
- Hostiensis: Henricus de Segusio Cardinalis Hostiensis (d. 1271, Italian canonist), *In primum [secundum, tertium, quartum, quintum] Decretalium librum commentaria*, Venice, 1581; *Summa [Decretalium]*, [Lyons], 1537.
- Hotmannus: Franciscus Hotmannus (1524–90, French jurist), *Quaestionum illustrium liber*, Geneva, 1598.
- Illescas: Gonçalo de Illescas (d. ca. 1580, Spanish historian), *Segunda parte de la historia pontifical y catholica*, Burgos, 1578.
- Innocentius IV: Innocentius IV (d. 1254, Italian canonist and pope), *Apparatus super primo, secundo, tertio, quarto et quinto Decretalium libris*, [Lyons, 1520]. The second reference to Innocentius at II.V.21 n. 4 is an error for Johannes de Imola.
- Instructie Admiraliteyt: *Instructie van de Heeren Generale Statender Vereenighde Nederlanden voor de Collegien van der Admiraliteyt . . . in date den 13 Augusti 1597*, in *Groot Placaetboeck . . . by een gebracht door Cornelis Cau*, The Hague, 1664.
- Instructiones rei maritimae, see Instructie Admiraliteyt.
- Ius Graeco-Romanum, see Leunclavius.
- Jacobus de Belviso: Jacobus de Belviso (ca. 1270–1335, Italian civil lawyer), *Commentarii in Authenticum et Consuetudines feudorum*, Lyons, 1511.
- Jason de Maino: Jason Maynus (1435–1519, Italian jurist), *Consiliorum pars prima [secunda, tertia, quarta]*, [Lyons], 1534; *In primam [secundam] Codicis partem commentaria*, [Lyons], 1533; *In primam [secundam] Digesti Veteris partem commentaria*; *In primam [secundam] Infortiati partem commentaria*; *In primam [secundam] Digesti Novi partem commentaria*,

- [Lyons], 1533; *Commentaria super tit. de actionibus Institutionum*, [Lyons], 1541.
- Jean Froissart: Jehan Froissart (1338–ca. 1410, French historian), *Histoire et chronique memorable*, Paris, 1574.
- Johannes Andreae: Ioannes Andreae (d. 1348, Italian civil lawyer), *In secundam Decretalium librum novella commentaria*, Venice, 1581.
- Johannes Bertachinus: Ioannes Bertachinus de Firmo (d. 1497, Italian canonist), *De gabellis, tributis et vectigalibus*, in *Tractatus universi iuris* (q.v.).
- Johannes de Carthagena, *see* Carthagena.
- Johannes de Imola: Joannes de Imola (d. 1436, Italian canonist), *Super primo [secundo] Decretalium*, Lyons, 1525–49.
- Johannes de Lignano: Ioannes de Lignano (d. 1383, Italian canonist), *Tractatus de bello*, in *Tractatus universi juris* (q.v.).
- Johannes de Turrecremata: Ioannes a Turrecremata (1388–1468, Spanish canonist), *In primum volumen Causarum commentarii*, Lyons, 1555.
- Johannes Faber: Ioannes Faber (d. 1340, French jurist), *In Codicem breviarium*, Lyons, 1550.
- Johannes Ferus, *see* Ferus.
- Johannes Jacobus de Canibus: Ioannes Iacobus a Canibus (d. ca. 1494, Italian jurist), *De represaliis*, in *Tractatus universi juris* (q.v.).
- Johannes Leo, *see* Leo Africanus.
- Johannes Lupus: Ioannes Lupus (d. 1496, Spanish canonist), *Tractatus de bello et bellatoribus*, in *Tractatus universi iuris* (q.v.).
- Johannes Maior: Joannes Maior (ca. 1470–ca. 1540, Scottish theologian), *In Quartum Sententiarum quaestiones*, Paris, [1521].
- Johannes Sarisberiensis: Ioannes Sarisberiensis (ca. 1115–80, English philosopher), *Policraticus*, Leiden, 1595.
- Jornandes: Iornandes (sixth-century Gothic historian), *De Getarum sive Gothorum origine et rebus gestis*, Leiden, 1597.
- Junius Brutus: Stephanus Iunius Brutus (pseudonym of late-sixteenth-century Protestant theorist), *Vindiciae contra tyrannos*, Hanover, 1595.
- Knichen: Andreas Knichen (1560–1621, German jurist), *De sublimi et regio territorii iure*, in his *Opera*, Hanover, 1613; *De vestiturarum pactionibus*, in *ibid.*
- Krantzius: Albertus Krantzius (ca. 1450–1517, German historian), *Regnorum Aquilonarium, Daniae, Sueciae, Norvagiae chronica*, Frankfurt on Main, 1575; *Saxonia, De Saxonicae gentis vetusta origine, longuinquis expeditioni-*

- bus susceptis et bellis domi pro libertate diu fortiterque gestis*, Frankfurt on Main, 1580; *Wandalia, De Wandalorum vera origine, variis gentibus, crebris e patria migrationibus, regnis item, quorum vel autores vel eversores fuerunt*, Frankfurt, 1575.
- Kromer, *see* Cromerus.
- La Canaye, *see* Canaye.
- Lambertus Scafna burgensis: Lambertus Schafnaburgensis (fl. 1077, German historian), *Annales*, Strasbourg, 1609.
- Lapide: Cornelius Corneli a Lapide (1567–1637, Flemish Jesuit), *Commentaria in Pentateuchum Mosis*, Antwerp, 1618.
- Laymann, *see* Pacis compositio.
- Le Cirier: Ioannes Le Cirier (fl. 1515, French jurist). *Tractatus singularis de iure primogeniturae vel maioricatus*, in *Tractatus universi iuris* (q.v.).
- Leges Galliae, *see* Guenois.
- Leges Hispanicae, *see* Siete Partidas.
- Leges Siculae, *see* Constitutiones Siculae.
- L'Empereur, *see* Constantinus L'Empereur *and* Baba Kama.
- Leo Africanus: Ioannes Leo Africanus (fl. 1526, Moroccan geographer), *Africae descriptio IX lib. absoluta*, Leiden, 1632.
- Lessius: Leonardus Lessius (1554–1623, Flemish Jesuit), *De iustitia et iure caeterisque virtutibus cardinalibus libri quatuor*, Antwerp, 1609.
- Leunclavius: Iohannes Leunclavius (1533–93, German historian), *Iuris graecoromani tam canonici quam civilis tomi duo, Iohannis Leunclavii studio eruti latineque redditi cura Marquardi Freheri*, Frankfurt, 1596; *Historiae Musulmanae, Turcorum*, Frankfurt, 1591.
- Lex Baioariorum: *Lex Baivariorum*, in Lindenbrogius, *Codex* (q.v.).
- Lex Burgundionum: *Lex Burgundionum*, in Lindenbrogius, *Codex* (q.v.).
- Lex Langobardorum, *see* Lombarda.
- Lex Salica: *Liber Legis Salicae*, in Lindenbrogius, *Codex* (q.v.).
- Lex Visigothorum: *Codicis Legis Wisigothorum libri XII*, in Lindenbrogius, *Codex* (q.v.).
- Libri Feodorum, *see*, for example, Johannes Fehus, ed., *Corpus iuris civilis Iustiniani*, Lyons, 1627.
- Lindenbrogius: Fridericus Lindenbrogius (1573–1647, German Protestant jurist), *Codex legum antiquarum*, ed. Frid. Lindenbrogius, Frankfurt, 1613; *Observationes in Ammianum Marcellinum*, Hamburg, 1609.
- Littleton: [Thomas] Littleton (ca. 1420–81, English jurist), *Les tenures*, London, 1617.

- Loazes: Ferdinandus Loazius (d. 1568, Spanish theologian), *Consilium sive iuris allegationes super controversia oppidi a Mula orta inter illustrissimum Dom. a Velez Marchionem et illius subditos super dicti oppidi dominio atque iurisdictione*, Milan, 1552.
- Lombarda: *Legis Longobardorum libri tres*, in Lindembrogus, *Codex* (q.v.).
- Lopez (J.), *see* Johannes Lupus.
- Lopez (L.): Ludovicus Lopez (d. ca. 1595, Spanish theologian), *Tractatus de contractibus et negotiationibus*, Lyons, 1593.
- Lorca: Petrus de Lorca (1554–1606, Spanish theologian), *Commentaria et disputationes in Secundam Secundae Divi Thomae*, Madrid, 1614.
- Ludovicus II: Ludovicus II (778–840, king of the Franks and emperor), *Ludovici II Imp. Aug. rescriptum ad Basilium Imperatorem*, in *Collectio constitutionum imperialium* I, ed. Melchior Goldastus, Frankfurt on Main, 1615.
- Ludovicus Pius: Louis I (778–840, king of France), *Capitulare II Ludovici Pii*, in *Concilia Galliae* (q.v.).
- Ludovicus Romanus: Ludovicus Romanus (1409–39, Italian jurist), *Consilia*, [Lyons, 1520].
- Lupus, *see* Johannes Lupus.
- Magnus (J.): Ioannes Magnus (1488–1544, Swedish historian), *Historia Metropolitanæ Ecclesiae Upsalen.*, Roma, 1560; *Gothorum Sueonumque historia*, Basel, 1558.
- Magnus (O.): Olaus Magnus (ca. 1490–1568, Swedish historian), *Historia gentium septentrionalium variis conditionibus statibusve*, Basel, [1567].
- Maino, *see* Jason de Maino.
- Maior, *see* Johannes Maior.
- Malderus: Ioannes Malderus (1563–1633, Flemish theologian), *De Virtutibus theologicis et iustitia et religione commentaria ad Secundam Secundae D. Thomae*, Antwerp, 1616.
- Mantica: Franciscus Mantica (d. 1614, Italian jurist), *Vaticanae lucubrationes de tacitis et ambiguis conventionibus*, Geneva, 1615.
- Manutius: Paulus Manutius (1512–74, Italian humanist), *Antiquitatum Romanarum liber de legibus*, Paris, 1557.
- Mariana: Joannes Mariana (1536–1624, Spanish Jesuit), *Historiae de rebus Hispaniae libri XXX*, Maintz, 1605.
- Marsa: the reference to “Anthony Marsa” at II.VIII.8 n. 1 is probably an error in the 1642 and subsequent editions; Antonius Maria Vicecomes (q.v.) seems to be intended.

- Marsilius Patavinus: Marsilius Patavinus (d. 1328, Italian jurist, of Padua), *Defensor pacis*, Frankfurt, 1592.
- Martinus Laudensis: Martinus Laudensis (fl. 1440, Italian civil lawyer), *Tractatus de bello*, in *Tractatus universi juris* (q.v.).
- Masius: Andrea Masius (1515–73, Flemish theologian), *Iosuae imperatoris historia illustrata atque explicata ab Andrea, Masio*, Antwerp, 1574.
- Mastrillus: Garsias Mastrillus (d. 1620, Italian jurist), *De magistratibus, eorum imperio et iurisdictione tractatus*, Palermo, 1616.
- Mathie, *see* Wilhelmus Mathie.
- Matthaeus Mathesilanus: Matthaeus Mathesilanus (fifteenth-century Italian jurist), *Singularia*, in *Singularia doctorum in utroque iure*, Frankfurt, 1596.
- Maynus, *see* Jason de Maino.
- Medina (B.): Bartholomaeus a Medina (1527–81, Spanish theologian), *Expositio in Primam Secundae Divi Thomae*, Salamanca, 1588.
- Medina (G.): Ioannes Medina (1490–1547, Spanish theologian), *De paenitentia, restitutione et contractibus*, Ingolstadt, 1581.
- Meibomius, *see* Wittekind.
- Meichsner: Iohannes Meichsnerus (sixteenth-century German jurist), *Decisionum diversarum causarum in Camera Imperiali iudicatarum*, Frankfurt on Main, 1604.
- Melanchton, *see* Chronicon Melanchtonis.
- Menchaca, *see* Vasquius.
- Mendoza: Bernardino de Mendoza (sixteenth-century Spanish historian), *Comentarios de lo sucedido en las guerras de los Payses baxos*, Madrid, 1592.
- Menochius: Iacobus Menochius (1532–1607, Italian jurist), *Consiliorum sive responsorum liber primus [tredecimus]*, Frankfurt on Main, 1625; *De arbitrariis iudicum quaestionibus et causis libri duo*, Cologne, 1615; *De praesumptionibus, coniecturis, signis et indicis commentaria*, Cologne, 1628.
- Meursius: Ioannes Meursius (1579–1639, Dutch historian), *Historiae Danicae libri III*, Copenhagen, 1630.
- Meyerus: Iacobus Meyerus (1491–1552, Flemish historian), *Commentarii sive Annales rerum Flandricarum*, Antwerp, 1561.
- Mindanus, *see* Friderus Mindanus.
- Molina: Ludovicus de Molina (1535–1600, Portuguese Jesuit), *De Hispanorum primogeniorum origine ac natura libri quatuor*, Cologne, 1588; *De iustitia et iure tomi duo*, Maintz, 1602–3.
- Molinaeus: Carolus Molinaeus (1500–1566, French jurist), *Prima pars com-*

- mentariorum in Consuetudines Parisienses*, Paris, 1539; *Annotationes*, in Alexander Tartagnus, *Consiliorum prima pars* . . . (q.v.).
- Monstrelet: Enguerran de Monstrellet (ca. 1390–1453, French historian), *Le premier [second, tiers] volume des chroniques*, Paris, 1518.
- Monte (Hieronymus de), *see* Hieronymus de Monte.
- Monteferrato, *see* Guilielmus de Monteferrato.
- Mysinger: Ioachimus Mysingerus (1514–88, German jurist), *Responsorum iuris sive consiliorum decades decem*, Basel, 1576; *Singularium observationum Iudicii Imperialis Camerae (ut vocant) centuriae quatuor*, Basel, 1563.
- Natta: Marcus Antonius Natta (sixteenth-century Italian jurist), *Consiliorum sive responsorum tomus primus, [secundus, tertius, quartus]*, Venice, 1570–74.
- Navarra, *see* Petrus de Navarra.
- Navarrus: Martinus ab Azpilcueta Navarrus (1493–1586, Spanish theologian), *Enchiridion sive Manuale confessariorum et poenitentium*, in his *Opera* III, Cologne, 1616.
- Neostadius: Cornelius Neostadius (1549–1606, Dutch jurist), *De pactis antenuptialibus rerum iudicatarum observationes*, The Hague, 1605.
- Nicolaus Everardi: Nicolaus Everardus a Middelburgo (1461–1532, Flemish jurist), *Loci argumentorum legales*, Lyons, 1556.
- Nov. Emanuelis Comneni: *Novella Emanuelis Comneni*, in Leunclavius, *Iuris graeco-romani* (q.v.).
- Oceanus iuris, *see* Tractatus universi iuris.
- Oderbornius: Paullus Oderbornius (fl. 1585, German Lutheran theologian), *Ioannis Basilidis Magni Moscoviae Ducis vita*, [Wittenberg], 1585.
- Oldendorp: Ioannes Oldendorpius (ca. 1480–1567, German jurist), *Actionum forensium pro gymnasmatas*, in his *Opera* II, Basel, 1559. *See also* *Consilia Marpurgensia*.
- Oldradus: Oldradus de Ponte (d. 1335, Italian canonist), *Consilia seu responsa et quaestiones aureae*, Venice, 1571.
- Osorius: Hieronymus Osorius (1506–80, Portuguese historian), *De rebus Emanuelis Regis Lusitaniae gestis*, in his *Opera omnia*, Roma, 1592.
- Otto Frisingensis: Otto Frisingensis (ca. 1111–58, German historian), *Leopoldi Pii Chronicon, eiusdem De gestis Friderici I libri duo, Radevici Frising, de eiusdem Frid. gestis libri II, Guntheri poetae Ligurinus sive de gestis Friderici libri X*, Basel, 1569.

- Pacis compositio: [P. Laymann(?) (1575–1635, German Jesuit)], *Pacis compositio inter principes et ordines Imperii Romani catholicos et Augustanae confessioni adhaerentes in comitiis Augustae anno 1555 edita, quam jureconsulti quidam catholici quaestionibus illustrarunt anno 1629, editio altera*, Dillingen, [1629?].
- Panormitanus: Abbas Panormitanus (Niccolò Tedeschi, 1386–1445, Italian canonist), *Consilia iurisque responsa ac quaestiones*, Lyons, 1586; *Prima [secunda] pars super primo, prima [secunda, tertia] pars super secundo, super tertio, super quarto et quinto Decretalium*, Lyons, 1516–17.
- Papa, *see* Guido Papa.
- Pareus: David Pareus (1548–1622, German Reformed theologian), *In divinam ad Romanos S. Pauli apostoli epistolam commentarius*, Heidelberg, 1620.
- Paruta: Paolo Paruta (1540–98, Italian humanist), *Historia Vinetiana*, Venice, 1605.
- Paschalius: Carolus Paschalius (1547–1625, Italian historian), *Legatus*, Paris, 1612.
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